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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

POLARIS INSURANCE COMPANY, LTD, a foreign corporation

Petitioner

CHARLES J. BRUNET, PLAINTIFF

Respondent

MAGNOLIA HOLDINGS

Respondent

On Petition forWrit of Certorarai to the Supreme Court and the Fifth Circuit Court of Appeal of the State of Louisiana

PETITION FOR WRIT OF CERTIOARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the 5th Cir. ruling that Marine Marketing was inapplicable because it concerned doing business in the State of Louisiana.

1. WHETHER THE 5TH CIRCUIT COURT OF APPEAL ERRED IN RULING THAT MARINE MARKETING SERV. DOES NOT APPLY HEREIN AND THAT POLARIS MUST POST SECURITY BY AUTHORITY OF La. R.S. 22:1245 and 1255. #

2. WHETHER THE 5th CIRCUIT COULD RULE THAT AS A MATTER OF PUBLIC POLICY WHEN THE STATE OF LOUISIANA IS A PLAIN AND CLEAR LANGUAGE STATE.

3. WHETHER THE SUBJECT OF LA. R.S. 22:1255 DOES NOT CONCERN DOING BUSINESS IN THE STATE OF LOUISIANA BUT ACCESS TO THE COURTS

4. WHETHER THE 5TH CIRCUIT COURT OF APPEAL ERRED IN RULING THAT THE PLAINTIFFS' MOTION TO STRIKE POLARIS' PLEADINGS AND TO ORDER POLARIS TO POST SECURITY WAS DECIDED IN CONSIDERATION OF A MEMORANDUM AND EXHIBITS THERETO THAT WERE INEFFECTIVE IN THAT THE MEMORANDUM WAS IMPROPERLY SERVED AND THE EXHIBITS WERE NOT SERVED THEREBY DENYING POLARIS DUE PROCESS AND EQUAL PROTECTION OF LAW

5. WHETHER THE ADVERSE PRESUMPTIONS ARE SUPPORTED BY THE FACTS OR THE LAW ARE IN VIOLATION OF THE DUE PROCESS AND EQUAL

PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

6. WHETHER THE 5TH CIRCUIT COURT OF APPEAL ERRED IN RULING THAT STATE of Louisiana In the Interest of J.B., 499 So. 2d 611 IS APPLICABLE AND POLARIS APPEAL WAS UNTIMELY.

LIST OF PARTIES

Before this court are those set forth in the caption:
Charles J. Brunet, plaintiff employee of Magnolia Holdings, Inc.;
Magnolia Holdings, Inc. the defendant employer of Plaintiff and Polaris Insurance Company, Ltd., insurer of Magnolia, Direct Action Defendant of Brunet and Third Party Defendant of Magnolia.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Polaris is entitled to Due Process of Law and Equal Protection of the Law. These guarantees were not recognized by the courts in Louisiana.
The legislature of the State of Louisiana defined Maritime Insurance La. R.S. 22.6(13)(e) and exempted Unauthorized Insurers providing Maritime Insurance La. (Exemptions), and La. R.S. Sect. 22:611, Part XXIV, which regulated the contract and R.S. 22:1249 B(7) Part XXVII which provided regulation and enforcement. The Courts disregard the exemption holding that denial of access to the courts is not covered by the exemption pursuant to La. R.S. 22:1255. The legislature had enacted La. R.S. 22:1250 which empowered the Insurance Commissioner to sue unauthorized insurers and brokers for injunctive relief. 1250 and 1255 are kissing cousins. They coexistive and are written on the same level of importance in the code. Appellate decisions hold that the unauthorized insurer is exempted from the power of the Commissioner by 1249. The courts claim that their power is not similarly circumscribed. La. Civ. Code Arts. 1, 2, and 3 and La. Civ. Code Art. 9 reserve the power of making law and public policy to the legislature. The La. Constitution defines the powers of the courts at Art. 5 and permits power to review the law and the facts (relative to the case at issue) only but does not permit rewriting the laws themselves. Louisiana is a clear language state and the courts must interpret the law as written.

The lower court refused to obey its own Local Rules which were formulated to protect a litigant from abusive service of documents. Local rules CIVIL RULE XVI NOTICE, CIV RULE XVII EXHIBITS. Plaintiff presented documents in court which had not been served on Polaris and which had not been filed at least 72 hours before the hearing pursuant to Local Rules.

REASONS FOR GRANTING WRIT

The business of Maritime Insurance is Global. The incidents of loss are Local. The laws of every jurisdiction are presumed knowledge of everyone subject thereto. Laws should be fair rather than arbitrary, clear rather than ambiguous and equally applied with no favor to the local litigant over the foreign litigant.

It is unfortunate that the Fifth Circuit Court of Appeal felt bound to construct a happy ending for Plaintiffs. Louisiana is a clear language state. The law is what the legislature says it is as written in its statutes. The Louisiana courts have no license to establish public policy at any level, District Court , Appellate Court or Supreme Court. The happy ending is created by the court's ruling that as a matter of public policy Polaris is not entitled to appear in its courts without posting security despite a clear exemption from doing same.

Access to the courts is a fundamental aspect of fairness. The right to a fair hearing is basic to due process. Neither is it fair to base the price for hearing on allegations and unproved fact demanding five hundred thousand dollars until the court proceedings are finished. The so-called fairness to Polaris for Posting Collateral is the proposed recovery; that should Polaris win, the impecunious plaintiff may be ordered to pay interest. As a practical matter, recovery of any interest from the impecunious claimant is not merely improbable but, in reality, impossible. To hold this dubious remedy satisfies the requirement of due process and equal protection of law is a fiction.

Our real world is defined by speed of communications on the internet, Website pages and interstate and international trade. Everyone is presumed to know the law of the

jurisdiction in which he does business. If this presumption is consistent with due process and equal protection of law one must be able to rely on the clear meaning of the terms. The law as it is written should be the law as applied. A disturbing modern trend is the manifestation in government of the "speak think" of George Orwell's, "Brave New World". The Orwellian Government destroys the freedom of its people by redefining terms and manipulating language so as to effect governmental a restrictive policy which strips its people of their civil rights. War is peace, slavery is redefined as freedom. In the instant case the Louisiana courts tell us this is a case of access to the courts and not control of the business of insurance, not regulation of the business of insurance and not the same thing as the Commissioner having been authorized to bring legal action regarding the sale of insurance. The so called access sections were placed on the same level as the section empowering the Commissioner to commence litigation as in Marine Marketing. Litigation is the business in which all businesses share similarity. Insurance and litigation are unfortunate realities of doing business in America today.

Wilburn Boat gives the states control of the business of insurance of they chose to do so but the states have an obligation in exercising control to do so with a comprehensive scheme is part of the requirement for the states to regulate the business of insurance.

In this case the unfairness is manifest with the manner in which the court permitted the local resident to serve moving papers on Polaris' counsel by FAX while he was on an airplane en-route to the court for hearing, to introduce into evidence written documents that failed to comply with the hearsay rule and admitted as evidence, over objection, an unauthenticated letter allegedly written by the British Virgin Islands Government Office. The local court disregarded the disclaimer which the Government Office appended thereto that the

statements made therein were true and correct. The local court also disregarded its own local rules regarding service of the moving papers and exhibits all to the prejudice of Polaris.

The local court issued any order plaintiff's counsel requested, believed everything plaintiff said and disregarded everything Polaris presented by way of documentary evidence. Typical of said actions were the issuance of contempt citations beyond the District Court's jurisdiction and orders and judgments which were so obviously unfounded that the Fifth Circuit Court of Appeal for the State of Louisiana vacated them.

PETITION FOR WRIT OF CERTIOARI

Polaris Insurance Company, Ltd. respectfully petitions for writ of certioari to review the judgments and orders of the Supreme Court of the State of Louisiana, the Fifth Circuit Court of Appeals of the State of Louisiana, and the 24th District Court, Parish of Jefferson, State of Louisiana.

OPINIONS BELOW

The Supreme Court of Louisiana denied Polaris Writ of Certioarai to review the Order of the Fifth Circuit Court of Appeal,. without comment, reasons. The date of the Supreme Court's order is May 29, 1998 which is within the time for filing said Application for Writ.

Opinion and Reasons of Fifth Circuit Court of Appeal State of Louisiana Reversing In Part and Affirming In Part. C Judgment on Motion to Compel Discovery, AUGUST 5, H Judgment and Reasons on which the Court based its Order that Polaris post bond for security, I Judgment on Motion to Strike Pleadings and for Sanctions, J November 5th Order Re: Joint Oral Motion for Sanctions K Order on Judgment Debtor Rule; L Order to Appear as witness, M No Preliminary Default Order found in the Record.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1). The Petition was filed herein on August 27, 1998

The order of the Supreme Court of the State of Louisiana was made on May 29, 1998; Polaris' application was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process and Equal Protection of the Law in that the Courts of the State of Louisiana, under La. Civ. Code Ann. Art. 9, is a clear language state, the Louisiana courts have rewritten the law and have taken upon themselves the power to establish public policy which is reserved to the legislature. La. R.S. Sect. 22:611 exempts Polaris from the requirements of contract as prescribed by the State of Louisiana, La. R.S. 22:1249 and La. R.S. 22:1269 exempt Polaris from the requirements of Posting Bond and from the Prohibitions of La. R.S. 1254 and 1255 regarding use of the Louisiana Courts. C.C. Arts. 1, 2 and 3 prohibit the courts from establishing public policy and reserve that power to the legislature. La. Code of Civ. Pro. art. 1155 required service of supplementary matter, Local Rules of Court for the Twenty-Fourth District of Louisiana, Parish of Jefferson CIVIL RULE XVI NOTICE Local rules CIV RULE XVII EXHIBITS required service at least 72 hours prior to hearing of the exhibits used in court upon which the judgment was based. There was no service, and no jurisdiction, thus the court orders are invalid.

A. CONCISE STATEMENT OF THE CASE

Polaris Insurance Company, Ltd. filed its motion for Devolutive Appeal on November 15, 1996, Exhibit A, in which it included all prior orders and judgments said motion was intended to include all matters. Said appeal was allowed, Exhibit B.

On October 2 and 3 1996, Plaintiff and Magnolia Holdings, Inc., M/H filed a Motion to Strike Polaris' answers

based on R.S. 22:1255. On October 4, 1996 Plaintiff filed a motion to file a supplemental memorandum. That was the date of the hearing on the original motion. In effect plaintiff filed its supplementary memorandum at the hearing. On October 15 and 17 1996 plaintiffs filed motions for sanctions and for adverse presumptions. On October 9, 1996 plaintiffs filed a motion for a reconsideration. The court granted plaintiffs an order to compel the discovery of the quote letter all applications. The court held in abeyance the issue of the bond.

October 17, 1996 the plaintiffs filed a motion for reconsideration of the Motion To Strike the Pleadings Filed By Polaris. An Expedited hearing was set for October 25, 1996. Polaris responded with an opposition to motions to strike an for the adverse presumptions.

On October 24, plaintiffs filed a motion to file a joint supplemental memorandum in support of the motion to strike the pleadings based on R.S. 1255. On October 24, 1996 plaintiff's attempted service on Polaris by FAX and sent a copy of the supplemental memorandum by Federal Express. Plaintiffs brought the "book" of exhibits to court. They had only one copy.

On October 25, the hearing convened. Polaris counsel participated by telephone. On October 25, 1996 the court granted the motions and the adverse presumptions. The court struck the pleadings of Polaris.

The judgment says: IT IS ORDERED AND ADJUDGED AND DECREED that the joint motion to strike pleadings filed by Polaris Insurance Company, Ltd. or to require posting of a bond pursuant to La. R.S. 22:1255 filed herein by Charles J. Brunet Magnolia Holdings and Maintenance Dredging, Inc., be GRANTED.

The court then ordered that Polaris post a bond in the amount of $500,00 by 12:00 noon on Monday, October 28, 1998 which bond is to be obtained from a A-Best rated bonding company, or other good and sufficient surety. If Polaris fails to post the bond bay 12:00 noon CST on Monday October 28, 1996, the entirety of the pleadings filed by Polaris will be struck from the record and the Clerk of the Court and shall enter a preliminary against Polaris Insurance Company, Ltd. Polaris pleadings had already been stricken as shown above. The second order was surplusage.

No contempt order was ever issued against Polaris regarding the bond. The court made no further orders re: the bond.

The District Court issued an adverse presumption that Polaris quoted crew coverage and that the M/H application requested crew coverage. Polaris, in opposition to said motion re: adverse presumption was unable to produce a copy of the application and produced other documents which had been given to plaintiffs before to show that Polaris had not offered crew coverage nor workers compensation by way of a binder that had been sent directly to M/H on November 6, 1993 which showed no crew coverage nor coverage of employees and that M/H was required to maintain Worker's Compensation and Employee's Liability Insurance for its employees. Polaris also produced evidence by way of documents that showed that both Polaris and Keith Fogg M/H's agent were asking M/H for the application as late as November 22, 1993, after Polaris had delivered the policy on November 18, 1993.

Please refer to Appendix D, E, F, G and E which demonstrate that the court and plaintiff referred to the supplementary memorandum and its exhibits and to documents that were not timely filed by the Court of Appeals own admission. The court of appeals agreed that the filing of

October 24, 1996 was not timely but mistakenly said that it was not used.

At all times herein M/H had in its possession the originals of the policies signed by Miguel Golcher, Managing Director of Polaris were produced in court on October 25, in the stack of exhibits not served on Polaris. Said stack and the original policies were brought into court on October 25, 1996 by M/H as part of its evidence in support of its motion to strike and to order posting security. All of said policies had been sent directly to M/H or received by M/H within a reasonable time from date of request and date of issue and prior to the date of loss.

Plaintiffs filed a Supplementary Memorandum, which was the core of their Motion to Strike Polaris' Pleadings, on October 25, 1996, the day before the hearing in violation of local rules, . Polaris was improperly served said moving papers by FAX on October 24, 1995 and by Federal Express. The document served by Federal Express did not arrive until 2:00 p.m. at the office of counsel for Polaris on October 25 1998, the day of the hearing when the hearing was already in progress. The exhibits were not served on Polaris. Polaris had no time to demand them. At the first hearing of October 4, 1996, on the Motion to Strike the court had announced that it did not have sufficient evidence before it to rule and that it would hold the matter in abeyance. The Plaintiff having not submitted sufficient evidence entitled Polaris to a dismissal of the motion. The court could and should have ruled against the motion. There was no continuance of the hearing on the Plaintiffs' Motion that Polaris to Post Security or in the alternative that the Court Strike Polaris Answers and order judgment against Polaris. The court continued the trial date which had been set for October 8, 1996 to October 29, 1996.

Polaris, in response to plaintiff's motion to produce the application for insurance had produced documents that showed

that Polaris and Keith Fogg, agent for plaintiff, Magnolia Holdings, had repeatedly asked that plaintiff M/H send its application. Polaris' counsel received the blank copy of the application from Mr. Carl J. Hebert. It had been attached to a FAX to M/H. Plaintiff M/H received binder and the policy without sending the application that plaintiff's themselves demanded. These documents explained that there was no application available because plaintiff had never made one. Despite all the evidence to the contrary on October 25, 1996 the court granted the motions and the adverse presumptions. See Appendix G.

Examining the statute we find that La. R.S. 22:1249 defines unauthorized insurers and exempts some of them from the (Code) effect of the following sections.

C. SUMMARY OF ARGUMENT

1. Marine Marketing does apply because the statutory exception is in the jurisdictional section of Part XXVII. It was clearly intended to limit the executive, judicial power and the power of the others who are the subject or the object of the several sections. The finding that 22:1255 only concerns access to the courts is absurd. Litigation is part of doing business as much as is selling or other facets of the modern enterprise. Find one successful enterprise without a stable of lawyers, both corporate and litigation. Two necessities common to all of today's business are insurance and lawyers.

2. The 5th Circuit Court of Appeal does not have the power to establish public policy. Public Policy is established by the Legislature in the State of Louisiana. Louisiana is known as a clear language state when considering construing a statute. La. Civ. Code Ann. art. 9(West 1990).

2. The 5th Circuit Court of Appeal citation of extension of bonding requirements requirements for Excess and Surplus Lines Brokers to the case of Marine Insurance does not support its attempt to establish public policy or compelling that

the legislature meant that marine insurers post bonds to gain access to the courts. R.S. 22:1269(Exemptions) belies that argument.

3. The 5th Circuit Court of Appeal citation of STATE of Louisiana In the Interest of J.B., 499 So. 2d 611 is inapplicable and in error. J.B. concerns the appealability of a contempt *citation AND the Judicial Jurisdiction which should be determined by this court rather than the inferior courts. In this case no contempt was found, instead, the District Court merely granted the plaintiff's motion to strike defendants pleadings and subsequently ordered Polaris post a bond. There was no finding of contempt. The 5th circuits citation of the District Court order of 11/4/98 is in error.

4. The 5th Circuit Court of Appeal's ruling that the Adverse Presumption was proper as a matter of law and fact is in error because Polaris showed that it had made diligent search for the quote letter demanded and failed to find it, that the letter was addressed to plaintiff and plaintiff should have had the original and that the subject matter, a quote of premium for crew coverage was irrelevant and immaterial and not evidence of the insurance coverage of the policy purchased and delivered and that further there was convincing evidence that Plaintiff M/H had never submitted an application but had never the less received a binder and policy.

Argument

1. WHETHER Marine Marketing was inapplicable because it concerned doing business in the State of Louisiana.

In its Opinion on appeal the 5th Circuit disregarded Marine Marketing Services as inapplicable because it was concerned with doing business in the State and applied its own conscience by pronouncing that as a matter of Public Policy the exemption of 1249 did not apply to 1255 which concerned access to the courts and not with doing business. The 5th Cir. ignored section C. of 1255 which refers to section 1253 which

concerns the same acts constituting doing business provisions in Section 1249. This shows that even 1255 concerns doing business in the state because if the defendant is not doing business it is not subject to the jurisdiction of these courts.

Standard of Review at this time is de novo based on MARINE MARKETING SERV. v. DEPT. of INS., 673 So. 2d, at 338. The court must apply the clear and unambiguous rule of interpretation herein as pronounced in Vehers v. Jefferson Insurance Company et al, Defendant-Appellant 166 So. 2d 20 and Albers v. Jacob J. Schwab, et al and Fidelity General Insurance Company, 223 So.2d 301. at page 302 N 2. A trial on the merits had to be held to determine defendant's status regarding requirement to post bond. The interlocutory judgment becomes final and is appealable as a final judgment and the issue regarding the status of the defendant in the court of appeals is not subject to any duty to post security. [Vehers, at page 21]. Status and Facts

STATUS AND FACTS

On October 3, 1996 Plaintiffs M/H and Brunet brought a Joint Motion to Strike Polaris Pleadings or for an Order that Polaris Post Security requesting an expedited hearing thereon. The trial was set for October 8, 1996, only four days later. Plaintiffs attached only the copies of the insurance policies herein to their exhibits. No affidavits were attached.

ARGUMENT

Plaintiff relied upon La. R. S.+ 22:1254 and 1255 (West 1995); in regard to the act of transacting of a business of insurance by an unauthorized insurer. In order for Appellees to prevail Appellant must be subject to the requirements of + 1254 and + 1254. Appellant must be defined as an unauthorized insurer by the code. Section 1255 states in the pertinent part:

La. Rev. Stat. Ann. Sect. 22:1255 (A)(1) (West 1995)

(A) Before any unauthorized insurer shall file of cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall. . . file with the clerk

of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties.

It is not contested that the La. R.S. (A) of + 1249 subjects said unauthorized insurers to the authority of the insurance code by doing business in the state. At issue is whether the same jurisdictional statute La. R.S. 22:1249 B (7): and indemnity or other risk including strikes and war risks commonly insured under ocean or wet marine forms of policy." determines and limits the authority of the courts over said "unauthorized insurers" in Louisiana.

B This Section shall not apply to:

(7) Insurance on vessels, crafts, hulls, cargos, marine builders risks, marine protection

The list of exceptions begins by stating that lawful transactions of "surplus line insurance" and "reinsurance" are exempt. More importantly, sub-paragraph (7), Appellant is specifically excepted from the definition of an "unauthorized insurer". La. Rev. Stat. Ann. § 22:1249(B)(7), Paragraph (B) states in the pertinent part:

The instant case deals with a claim made under a marine protection and indemnity policy issued and delivered by Appellant. The section cited above was originally enacted 1968 with Paragraph (A). Paragraph (B) of + 1249 was added by revision in 1968. Paragraph (B) comprises a list of exceptions to paragraph (A), which the legislature added to bring PART XXVII up to date is applicable in this case. Under the express provisions of La. Rev. Stat. Ann. § 22:1249(B)(7), Appellant, although it may not be authorized to sell policy in Louisiana is not defined as an "unauthorized insurer" that is subject to the remainder of Part XXVII which also contains La. Rev. Stat. Ann. § 22:1249(B)(7) and is not subject to the requirement of La. R.S. 22:1255, consequently, Appellant is not required to post bond or other security in this case.

"Thus, placing and delivering marine protection and indemnity insurance and hull insurance is excepted from the

definition of transacting a business of insurance by an unauthorized insurer."

2. The courts cannot make public policy in the face of contrary legislation

In Louisiana, Article One of the Louisiana Civil Code (Code) declares that in Louisiana "[t]he sources of law are legislation and custom". LSA -C.C. art 1. Article two emphasizes the prevailing source of law; legislation, stating that [l]egislation is a solemn expression of legislative will, "LSA C.C. art. 2 and article three of reinforces this focus on legislation as the prevailing source of law, stating that although "[c]ustom results from practice repeated for a long time and [is] generally accepted as having acquired the force of law. Custom may not abrogate legislation. "LSA- C.C. art. 3.

Nowhere in Louisiana Legislation is it suggested that a court in this state can decide an issue on "public policy" grounds. On the contrary, the code is specific with regard to the sources of law available to a court, of which public policy is conspicuously absent.

Therefore, Polaris respectfully urges that the 5th Circuit Court of Appeal erred by applying the doctrine of "public policy" as perceived by the 5th Circuit in clear opposition to the express public policy enacted by the Louisiana legislature.

The United States Supreme Court has long held that "[p]rimarily , it is for the [State] lawmakers to determine Public Policy of the State, Twin City Pipe Line Co. et al. v. Harding Glass Co., 285 U.S. 353, 357 (1931). Therefore, each state can determine exactly what constitutes "public policy" within its borders. This Honorable Court has long held that:

[I]n a state governed exclusively by written laws, as [Louisiana] is, the courts are much less free to determine what is or is not public policy. The Public Policy of a state thus governed by written laws is not a mere matter of impression of opinion, or a matter to be determined from what appears to be, or not to be, to the public interest; but is a matter expressed more or less

definitely in those written laws, and to be there searched for, and when found, to be enforced with the same inflexibility as a the written laws themselves.

Whether the common-law courts would consider themselves at liberty to refuse to enforce in any given case a recognized public policy, we do not know ... However, whatever latitude the common law courts may enjoy in that regard, ours enjoy none whatsoever, but are rigidly tied down by and express statute, which declares that parties cannot by their conventions derogate from public policy.

Female Orphan Society v. Young Mens Christian's Ass'n., 119 La. 278, 284, 44 So. 12,17-18 (La. 1907)

It has long been the law if Louisiana that the provisions of a statute should be construed in harmony with the whole statute. See Tuck v. Commercial Standard Ins. Co of Dallas, Tex., 164 So. 472, 176 (La.App. 2nd Cir. 1935).

Consequently, in 5th Circuit Court of Appeal has erred in assuming the power to disregard the clearly expressed will of the legislature in Part which XXVII La. R.S. + 22:1249 B (7).

In its insistence that the cases cited all refer to doing business the 5th Cir. ignored + C. of 22:1255 refers to + 22:1253 re: service of process, access to courts, which concerns the same acts constituting doing business provisions in + 1249. This shows that even 22:1255 concerns doing business in the state because if the defendant is not doing business it is not subject to the jurisdiction of these courts. See 22:1255 C (1) re: issuing policy or contract, (2) re: insurer has not been transacting business ... and (3) wherein the person served was not doing any of the acts enumerated in 22:1253. Doing business in the state is a precondition to application of 22:1255 thus the jurisdictional exemption of 22:1249 applies to 22:1255. The preconditioning statute 22:1249 exempts Polaris from the rest of the section.

It is an attenuated subtlty that the 5th Circuit declare the provision of accessibility of the courts is not regulation of insurance. The jurisdictional section defines the powers of the

state of Louisiana in regulating Unauthorized Insurance and defines Unauthorized insurers for the purpose of the statute. It applies to the action by judicial branch as well as to the executive branch of government and determines the meets and bounds of the executive and judicial branches. In the case of the judicial branch it excuses these insurers from applying for admission and relieves them from control by the Commissioner and withholds from the courts power to require the bond.

3. WHETHER SUBJECT OF LA. R.S. 22:1255 DOES NOT CONCERN DOING BUSINESS IN THE STATE OF LOUISIANA BUT ONLY ACCESS TO THE COURTS

The 5th Circuit Court's finding that the exception does not apply because 1255 concerns access to the courts. The legislature controls access to the courts by determining the parameters of causes of action, the parties who may sue and who may be sued, jurisdictional amounts, venue, procedure for service of summons and complaints, age of majority and competency, and controls access to the courts in special circumstances such as this by special statutes. Litigation is as much a part of doing business as is production, sales, financing, etc. No matter what the enterprise may be it will require lawyers and become involved in litigation whether enforcement of contracts, for damage to goods, and for collection of fire insurance after a fire and so on and on.

Placing the courts as the arbiter regarding their own power is a great temptation that when themselves limited law that they would rule in their own favor, expand their power and thereby place themselves above the law.

Under the traditional Separation of Powers the courts are subject to control by the legislature except for the powers granted the courts by the Constitution of the State of Louisiana. Examination of the insurance code reveals that the State of Louisiana has enacted a comprehensive Code by which all aspects of Insurance are regulated. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S: 310, 75 S.Ct. 368 (1955) It

is the provision of comprehensive scheme of insurance regulation that supports the several states' authority to control insurance. In reading + 1250 said section empowers the Commissioner and in reading +s 1245 and 1255 said sections empower the courts and reading + 1249 B (7) limits the power of each respectively. As a practical matter, all of said sections empower or circumscribe the power of the courts. Put another way, if the Commissioner does not have the power to bring an action the court does not have the power to entertain it; in 1256, the power of the court to declare a policy void; in 1253 the power to assume jurisdiction etc. Every section in Part XXVII either confers or circumscribes judicial power. Section 1249 is the mother of all the power of all other sections which are in pari matria thereof.

Thus, regulation of insurance goes further than the action of the Commissioner but includes litigation. The Commissioner had filed a suit in Marine Marketing and the court found that it could not grant the relief the commissioner requested. The legislature had enacted a comprehensive insurance code all, parts of which it intended to be effective. La. R.S. 22:1255 is still effective against all non exempt unauthorized insurers.

The Courts are not super legislatures. The courts cannot make decisions contrary to the clearly expressed policy of the legislature no matter how desirable it may be and the courts must accept the doctrine of stare decisis.

The 5th circuit is clearly in error in its attempt to disregard not only Marine Marketing but also Vehers, Albers and Acadiana Shippers.

The 5th Circuit's observation that within Part XXVII the Excess and Surplus Lines Brokers must post bonds is neither persuasive nor logically any indication of legislative intent that the legislature intended to apply any other bond requirement in the case of Marine Insurance. On the contrary it shows that the Legislature considered it necessary and proper to express its will in statutory form regarding Excess and

Surplus Lines and chose not to do so regarding the exemption regarding Marine Insurance. AND THAT Surplus Lines Broker's sections requiring bonds cited by the 5th Circuit in support of its ruling, ++ R.S. 22:1256 through 22:1268 and 22:1270, are later exempted by the enactment of the legislature at La. R.S. 1269 Exemptions A(1) Ocean Marine and Foreign Trade Insurance etc. These are very same types of insurance as exempted in the jurisdictional statute + R.S. 22:1249 B including Marine Insurance, subsection (7). This should remove all doubt regarding the will of the legislature and public policy.

The court's excursion in distinguishing the application of La. R.S. 22:1254 from its kissing cousin 1255 is an exercise in ambivalence. 1254 is far more controlling than 1255 and yet the 5th Cir. remarkably finds that it qualifies for the exemption and does not concern access to the courts. Is there a case in point not cited in the 5th Cir. decision.

The 5th Circuit may not extend the requirement enacted regarding in Excess and Surplus Lines beyond its clear and unambiguous meaning no more than the Court could shrink the exemption of the Excess and Surplus Lines exemption to benefit a pleasure boat rather than a commercial vessel according to Marine Marketing.

INTERPRETATION OF STATUTE BY THE CLEAR AND UNAMBIGUOUS RULE IN
MARINE MARKETING SERV. v. DEPT of INS., 673 So. 2d, at 338

In Marine Marketing Serv. v. the Commissioner of Dept of Ins., 673 So. 2d 335, 338 [(La. App. 1st Cir. 1996), writ denied] 673 So.2d 335 (La. 1996). At page 338 the court cited the body of La. R.S. 22:1249 and the heading of the B section,

"This Section shall not apply to:"

(7) insurance on vessels, crafts, hulls ... protection and indemnity or other risks including strikes and war risks commonly insured under ocean marine and wet marine forms of policy."

Thus, placing and delivering an marine protection and indemnity insurance is excepted from the definition of transacting a business of insurance by an unauthorized insurer.

Marine protection and indemnity insurance is defined in the Louisiana Insurance Code. See La. R.S. 22.6(13(e) Louisiana revised statute 22:6(13) includes "marine protection and indemnity insurance" as a category of Marine and transportation (inland marine) insurance. Under section (e) of this statute, "marine protection and indemnity insurance" is defined as insurance against legal liability of the insured for,

loss, damage, or expense incident, operation, chartering, maintenance use, or repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness, or death or for loss of or damage to the ownership of another person.

Louisiana Revised Statute 22:611 includes marine and transportation (inland marine) insurance 22:1249(B)(7)." See Marine Marketing, 673 So. 2d, at 339.

The Marine Marketing Court stated: "[t)his statute clearly provides that the `authorization requirement' shall not apply to insurance on hulls or marine protection and indemnity insurance." Marine Marketing Serv. v. Dept. of Ins., 673 So. 2d, at 338 (emphases added). If the Commissioner is not entitled to regulate the sale of maritime insurance by application of Section La.R.S. 22:1250 of part XXVII as against a broker, because of La.R.S. 22:149(A)(7) there is no regulation and no authorization required of an unauthorized insurer to sell marine insurance including the requirement for filing of a bond or surety, because such insurers are not the class of unauthorized insurers thus regulated by the code. In Marine Marketing, (supra) [u]nder the clear wording of La.R.S. 22:1249(B)(7), if a foreign company issues hull and/or marine protection and indemnity insurance on a vessel, it is exempt from regulation by the Commissioner." To further clarify its position, the First Circuit explained that "[t]he exception contains specific examples of risks that the legislature concluded were `commonly insured' under ocean or wet marine forms of policy" Marine Marketing, 673 So. 2d, at 340.

The facts in the First Circuit's well reasoned and fully explained decision bear a strikingly similarity to this case. In Marine Marketing, a specialized foreign insurance broker was accused of illegally transacting business in Louisiana without authority for selling two mariner's insurance policies providing coverage for recreational vessels. Marine Marketing, 673 So. 2d, at 336. As in the case at bar, "the trial court in Marine

Marketing attempted to find the legislative intent behind the exception, concluding that coverage for recreational boats was beyond the intended scope of the marine exception."

La. R.S. Sect. 22:611 which is the first section in Part XIV titled Scope of Part of CHAPTER 1 INSURANCE CODE Part XIV THE INSURANCE CONTRACT. which reads as follows:

Sect 611. Scope of Part

A. The applicable provisions of this Part shall apply to insurance other than ocean marine and foreign trade insurances.

Louisiana has chosen not to regulate the formal terms of the marine insurance contract.

The First Circuit looked to + 22:1249 B (7) and R.S. +22:6(13)(e) of the Insurance Code to define marine protection and indemnity insurance, concluding, "that La.R.S. 22:1249(B)(7) and 22:6(13)(e) are clear and unambiguous".

Thus, the lower court erred when they searched for the legislative intent behind these statutes instead of applying the statutes as written." Marine Marketing, 673 So. 2d, at 338. Similarly, Appellant contends, the lower court in this case erred when it searched for the legislative intent behind these statutes instead of applying the statutes as written.

The form, arrangement and announced purpose of the subsection and the similar treatment of Surplus Lines Insurance clearly shows a shows pattern of exception of some classes of unauthorized insurance and insurers that demonstrates a well considered system of control of some and not of others.

Therefore, Appellant contends, that the holding and analysis followed by the First Circuit in Marine Marketing should be applied in this case and Appellant should not be required to post a bond as a condition to defense of this claim.

La.R.S. 22:1249 part XXVII, on its face is jurisdictional in nature and this purpose adds all the more to Polaris' argument that the exception was meant to exclude its policy from the force and effect of La. R.S. Sections 22:1254 and 22:1255. Without this jurisdictional construction the force and

effect the courts could not apply any of the Louisiana Insurance Code to Polaris.

Marine Marketing is instructed by the clear and unambiguous meaning of the statute.

The statutes are not irreconcilable. The language of the two read together says: any unauthorized insurer must post a bond, except for those exempt under the provisions of La.R.S. 22:1249 B. The application of La.R.S. 22:1254 and La.R.S. 22:1255 is merely limited by La.R.S. 22:1249 but not destroyed.

INTERPRETATION AND CONSTRUCTION OF THE STATUTES

This court will be further assisted by the Louisiana rule for Interpretation of Statutes. First and foremost is the Louisiana Rule of INTERPRETATION OF LAWS Article 9 Clear and unambiguous law.

"When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." This rule has support in many other jurisdictions.

The right of a person to an exemption should never be defeated through construction when he is a person within the exempted class. St. Louis v. Bender, 248 Mo. 113, 154 S.W. 88.

If full effect cannot be given to the words of a statute they must be made as effective as possible. Old Dominion v. B & L Association v. Sohn, 54 W.Va.101, 46 S.E. 222.

A statute should be construed as a whole and not as disjointed parts.

SPECIAL STATUTES v. GENERAL STATUTES

In the case where the statutes cannot be reconciled the special statute should prevail. U.S. ex. rel. Welch v. Farley, 18 F.Supp. 75. See also U.S. v. Griffin, 14 F. 2d 38. Section

1255 is a general statute referring to the entire class of unauthorized insurers whereas Sections 1249 and 1269 are special statutes because they refer to Excess and Surplus lines, a particular class within the general class thus the special statute R.S.22:1249 should be enforced.

The Louisiana Legislature has considered this approach to interpretation of the statute so important as to write it into law as the First Precept. See La. Civ. Code Ann. art. 9 (West 1990). Louisiana is known as a clear language state when considering this issue.

Thus, no matter which of these principles stated above sis or are applied we come full circle to the well reasoned Marine Marketing, that: the plain language of the statute is that, generally, any unauthorized insurer must comply with the requirement of 1255 to post security except those in 22:1249 B which includes the risks stated therein included in La. R.S. 22:1249B(7) which is the special statute rather than La. R.S. 22:1255 which is the general statute.

It is not for the court to assume that it has a better grasp of what is equitable, fair or just, good or bad, better or worse, wise or foolish, but first to apply the clear and unambiguous meaning rule and only when failing that to interpret the law as to what was intended in its enactment.

The Commissioner had urged the Marine Marketing court to find that the exception was meant to apply only to commercial vessels and the trial court attempted to assist by so interpreting the exemption concluding that coverage for recreational boats was beyond the intended scope of the marine exception. In the case at bar the District Court attempted at the urging of the Plaintiffs to find a legislative intent behind the exception.

Thus the Marketing Court erred when it searched for legislative intent behind these statutes instead of applying the statutes as written. Appellant contends the lower court herein similarly erred in searching for legislative intent instead of applying La.R.S. Sect 22:1249(B)(7) as written. The 5th Cir.

holding is a search for legislative intent that the legislature intended it to function as controlling access to the courts.

Supportive of this premise is Acadiana Shippers, Inc, v. Phoenix Fire & Marine Ins. Ltd. App. (3 Cir. 1994), 640 So.2d 800 "[The] Statute prohibiting persons from acting as agents does not apply to marine insurance".

The exception of Marine insurance is found not only in La.R.S. Sect 22: 1249 but also in La.R.S. Sect 22:611 and in the Regulations Section. Not only is the language clear and unambiguous but the Code is clear and unambiguous. That the Supreme Court of Louisiana refused review of Marine Marketing is persuasive, evidence that the Louisiana Supreme Court approves of the legal conclusions reached by the 1st Circuit Court of Appeal.

Before a court could apply unauthorized insurer provisions to defendant, which claimed to be a surplus line insurer not subject to the unauthorized insurer requirements, a trial on the merits of the case had to b e held to determine defendant's status, Albers v. Schwab, at 221 (Supra) and a trial on the merits is required herein.

CONCLUSION

The conclusion arrived at by the trial court and the support thereof in the 5th Circuit in this case is clearly erroneous as both fact and law for reasons that compelled the same conclusion by the trial court in Marine Marketing, Albers, Vehers and Jacobs.

Traditionally these exceptions have been interpreted to apply to and override the rest of Part XXVII and the Commissioner of Insurance admitted it although he asked the court to deviate.

4. WHETHER THE 5TH CIRCUIT COURT OF APPEAL ERRED IN RULING THAT THE PLAINTIFFS' MOTION TO STRIKE POLARIS' PLEADINGS AND TO ORDER POLARIS TO POST SECURITY WAS DECIDED IN CONSIDERATION OF A MEMORANDUM AND

EXHIBITS THERETO THAT WERE INEFFECTIVE IN THAT THE MEMORANDUM WAS IMPROPERLY SERVED AND THE EXHIBITS WERE NOT SERVED THEREBY DENYING POLARIS DUE PROCESS AND EQUAL PROTECTION OF LAW

Standard of review: de novo; in cases raising constitutional issues, the court has an obligation to make an independent examination of the whole record. See Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

The District Court for the 24th District of Louisiana erred in granting plaintiffs' motion to strike the pleadings and enter judgment because there was no effective evidence to support such finding.

First: there was no newly discovered evidence to support a renewed motion. Second: the Supplementary Memorandum was never properly served on Polaris.

STATEMENT OF THE FACTS

On October 3, the plaintiff made a motion to strike all pleadings of defendant Ins. Co. and to enter judgment. The following day the plaintiff filed a supplemental fact pleading (memorandum) in support of motion. On October 5, both parties were in court as plaintiff was handing the judge exhibits for consideration, plaintiff personally served defense with exhibits in court. Polaris objected based on lack of notice plaintiff stated that he had not served the defense prior to the hearing. Polaris had not received the Supplemental Motion nor the exhibits thereto prior to the hearing. Plaintiff now repeated its ambush pattern. Polaris counsel left San Diego, California on October 4, 1996 in order to be in New Orleans, Louisiana on October 5, 1996. On 10/4/96 Plaintiff served Polaris by facsimile at his office in California while he was on a plane to Louisiana for the hearing. The court had held the matter in abeyance and continued the trial date until October 29, 1996.

On October 17, 1996 plaintiff filed a Supplemental Memorandum and for reconsideration of its October 3, 1996 Motion to Strike or to Post Security CR Pages 706-709. On

October 24, 1996 plaintiffs repeated the abusive procedure of October 4, 1996 on October 24, 1996 and filed another joint supplemental fact pleading (memorandum) without permission see CR and served Polaris by FAX at 4:00 p.m. on 10/24/96 San Diego time one day and less than 24 hours before the hearing. Service by FAX was not authorized unless agreed upon by the parties prior to service until 1997. La. R.S. 13:3471 (8) (1997). No exhibits were filed or on 10/24/96. Plaintiffs brought a single set of exhibits into court at the hearing on October 25, 1996. CR pages 807-812. During the hearing Polaris objected to the late filing and not having received the exhibits. Polaris was unable to respond in so short a time.

ARGUMENT

In cases raising constitutional issues, this court has an obligation to make an independent examination of the whole record. Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

Granting a renewed motion based on a supplemental memorandum was improper because there was no new evidence. La. Code of Civ. Proc. art. 1155 (West 1996). The supplemental memorandum filed on October 24, 1996 was not timely filed nor properly served and Polaris was severely prejudiced thereby being unable to respond at all.

This judicial proceeding violated the Due Process Clause of the Fourteenth Amendment because counsel for defendant Ins. Co. was not given timely and proper notice in which to raise defenses due to improper service of pleadings and exhibits in violation of the Louisiana Code of Civil Procedure Service of papers in re: motions and as supplemented by the Local Rules of Court of the 24th District of Louisiana.

The District Court for the 24th District of Louisiana erred in granting renewed motion because there was no competent, new evidence to support such a finding. La. Code of Civ. Pro. art. 1155(West 1996). Supplementary pleadings must set forth items which have become exigible since the date of filing the original petition. Plaintiffs had the facts introduced in the

supplementary pleading at the time they filed their original petition but, failed to include them in their first Motion to Strike Polaris Pleadings.

The most important facts were the original insurance policies which plaintiff M/H had even before suit herein was filed and certainly had then on October 3, 1996 when they filed their Joint Motion and Memorandum to Strike Pleadings or Post Security. Thus, plaintiffs were precluded from supporting their motion based on these documents and the court was not entitled to review them as part of the evidence herein.

The 5th Circuit is in error when it found that there was no prejudice because the District Court did not permit the filing of the Supplementary Memorandum. The court record shows that contrary to this 5th Cir. ruling at page 20 of its Opinion that it was the not the plaintiff's Supplemental Memorandum of October 17, 1996 but the Supplemental Memorandum of October 24, 1996 and its Exhibits of October 25, 1996 that the District Court relied upon in making its ruling. CT 940-1056 Ex.

The Due Process Clause of the Fourteenth Amendment provides, that no state shall "... deprive any person of life, liberty, or property without due process of law."

The Louisiana Code of Civil Procedure seeks to ensure that due process is complied with by requiring that, "every pleading subsequent to the original petition be served on the adverse party." La. Code of Civ. Proc. art. 1312 (West 1996).

Furthermore, local rules provide that, "in all cases where notice is required, and no time is specified by law, by these rules, or by the order of court, seventy-two (72) hours shall be allowed." Local Rules of Court for the 24th District of Louisiana, Parish of Jefferson. Rule XVI CIVIL RULE XVI NOTICE

Local rules, CIV RULE XVII EXHIBITS, also provide, "all exhibits shall be exchanged between parties seventy-two (72) hours in advance of the trial or hearing." Local Rules of Court for the 24TH District of Louisiana XVII.

Plaintiffs' ambush of October 5, 1996 was repeated on October 24, filing another joint supplemental memorandum. At the hearing Polaris objected to the introduction of the exhibits without having been served several pages long with a set of exhibits six inches high. The District Court condoned this breach of notice requirement. The 5th Circuit Court of Appeal dismissed Polaris' Assignment of Error on the basis that there was no prejudice shown. Breach of the procedural requirement for timely service of all pleadings is prima facie evidence of prejudice. Unauthorized and defective service of a memorandum of several pages which constitutes the core of the movant's motion is prejudicial. See record filed herein referring to the exhibits provided on October 24, in violation of local rules Claiming that the the late brief was not used however the record shows otherwise Unauthorized service by FAX is no service at all. Service by FEDERAL EXPRESS with delivery made at the same time the actual hearing was in progress is prejudicial. See CT pgs # which shows that the operative pleading which was actually at issue was the one filed on October 24, 1996. It matters not if the motion was filed on October 17, 1996 if the operative pleading was filed on October 24, 1996 and the six inch thick book of exhibits was brought into court at the time the hearing was scheduled. That service be timely requires that service be made within time for the opposing party to review the pleadings consider the allegations review the exhibits compose a response and file that response none of which Polaris was afforded in the time frame herein. Plaintiffs did not request nor did the court grant any order shortening time.

CONCLUSION

The Lower Court erred when it granted a motion striking Polaris pleadings resulting in a default judgment based on a supplementary motion pleading improperly served which contained no facts previously unknown to plaintiff. See Appendix Doc.s

5. THE ADVERSE PRESUMPTIONS ARE NOT SUPPORTED BY THE FACTS OR THE LAW ARE IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

STANDARD OF REVIEW, based on clear error of law and fact is de novo.

On receipt of underwriting files through discovery Plaintiffs complained a "quote letter" allegedly dated October 6, 1993, referred to in the files, was not among the documents produced and that there was not an application for each and every policy. The court on motion ordered Polaris to produce in court copies of the quote letter and the applications. Polaris made a diligent search of its files and answered that it had made said diligent search of its files and could not locate the referenced "quote letter". The court, on motion of Plaintiffs, ruled that there was an adverse presumption that the contents of the letter was unfavorable to Polaris position and ruled that the letter offered crew and employee coverage and that M/H had asked for crew coverage in the application.

The application for insurance coverage is governed by the general rules of contract. Upton v. Fidelity Standard Life Ins. Co., App, 1996 185 So.2d 297. An application of insurance is not a contract of insurance but merely a proposal or offer by an applicant for purchase of insurance. Upton v. Fidelity Standard Life Ins. Co., (Supra) An application for insurance is an offer, which does not become a contract until accepted by the insurance company through one authorized to do so [al]though accompanied by a premium note. Foster v. Morrison, App. 1933, 145 So. 13. Acceptance is made by delivery of binder or delivery of policy to the insured without its objection.

Applying the above, the insured is only entitled to the terms in the policy it received and the application itself is of no consequence. Likewise a quote letter is of little consequence being only part of negotiation preceding the contract.

Not withstanding that Polaris did not produce an application, it offered proof that plaintiff Magnolia Holdings did not send the application in that M/H was sent numerous demands for the completed application even after the policy itself had been sent to M/H. M/H produced no evidence that it ever sent the application to Fogg and no evidence that Fogg ever sent the application to Polaris.

The blank application provided to show that Polaris never received an application was provided to counsel by Mr Carl J. Hebert Esq. Counsel for M/H. It had been attached to the communication from Fogg, Plaintiff's insurance agent to M/H with a request that it be filled out and returned. See CR

The form application used by Polaris in this case states: see CR page 771 Application last paragraph:
"I understand that I am in no way bound to accept any quotation which the Company may make and that the Company is not bound to accept the risk. I understand that the insurance offered is offshore to the United States for commercial marine risks and has been solicited by me to the Company directly or through an agent who has explained this risk to me."

Assuming the worse case scenario, Polaris quoted a rate for crew coverage. A quote is not an offer that may be accepted. It is only a statement of rates. A policy whose terms differ from that of the application constitutes a counter-offer. Acceptance of the policy constitutes acceptance of the counter-offer.

An insured cannot accept the contract claiming not to have read it, put it into a drawer or file and forget about it until the occurrence of some catastrophic event and only then review the policy's terms for coverage and finding none complain that he wanted coverage that is not provided in the policy.

The policy itself is the ultimate evidence of insurance. The Plaintiff M/H had the original policies at all times herein.

The binder was delivered at a time when Polaris was asking for the application and when Fogg was trying to get it from M/H to send it to Polaris. See CR page 738 for Binder

for River Products the former name of Maintenance Dredging, Inc. and CR page 739 for Magnolia Holdings, Inc. The Binders recite that they were issued on November 6, 1993. That date is consistent with the date of coverage on the policies; the numbers of the binders are consistent with the numbers of the policies.".

No premium is charged opposite this annotation. The only plausible interpretation for these entries is that M/H was required to carry insurance for its employees on a separate policy and that the Polaris policy did not cover them.

Plaintiffs request for an adverse presumption of was an attempt to have the District Court rewrite the insurance contract. Courts have no authority to change or alter the terms of insurance policies. Jacobs v. Metropolitan Insurance Co., App. 39 So.2d 346. Disregard of this clear and convincing evidence was a clear abuse of discretion.

CONCLUSION

There are no facts whatsoever to support the adverse presumption regarding the failure to produce an application which for the policy herein whether it establishes that M/H requested Crew Coverage or not. On the contrary, the facts clearly show that plaintiff M/H never submitted an application.

Polaris explanation for failure to produce the application and was reasonable and supported by the evidence. Polaris provided a compelling and excuplatory explanation therefor in that the plaintiff had never sent it the application to Polaris. Thus the order creating an adverse presumption regarding the application should have been reversed.

6. THE 5TH CIRCUIT COURT OF APPEAL ERRED IN RULING THAT STATE of Louisiana In the Interest of J.B., 499 So. 2d 611 IS APPLICABLE AND POLARIS APPEAL WAS UNTIMELY.

Furthermore, the 5th Circuit attempt to dismiss Polaris' claim with citation of STATE of Louisiana In the Interest of

J.B., 499 So. 2d 611 is and in error. J.B. concerns the appealability of a contempt citation which is final immediately This is a case of an interlocutory order.
No dismissal was made for contempt instead the plaintiff's motion to strike defendants pleading on failure to post bond was granted. See CT at pgs. 807- 818.

CONCLUSION
THIS COURT SHOULD GRANT Polaris permission to file a full brief on appeal.

10/30/98

Respectfully submitted,

Joseph L. Gimbrone Esq. Cal Bar # 36840

APPENDIX A

ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING POLARIS RELIEF BY WRIT OF CERTIORARI

THE SUPREME COURT OF THE STATE OF LOUISIANA
CHARLES J. BRUNET

VS. NO. 98-C - 0990

MAGNOLIA QUARTERBOATS INC., ET AL

IN RE: Polaris Insurance Company Ltd.; Defendant(s); Applying for writ of Certiorari and/or Review; Parish of Jefferson 24th Judicial District Court Div. "I" Number 478-181; to the Court of Appeal, Fifth Circuit, Number 97-CA-0187

May 29, 1998
Denied.
JPV
PFC
WFM
HTL
CDK
BJJ
JTK

TAYLOR, J. not on panel.

Supreme Court of Louisiana
May 29, 1998
S/ Theophile A. Dumcelet
Deputy Clerk of Court
for the Court

APPENDIX B
OPINION AND REASONS OF FIFTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA REVERSED IN PART AND AFFIRMED IN PART

CHARLES J. BRUNET
VERSUS
MAGNOLIA
QUARTERBOATS, INC.
ET AL.

FIFTH CIRCUIT
COURT OF APPEAL
STATE OF
LOUISIANA
No. 97-CA-187

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 478-181. DIVISION "I"
HONORABLE JO ELLEN GRANT, JUDGE

MARCH 11, 1998

JAMES L. CANNELLA
JUDGE

Panel composed of Judges H. Charles Gaudin, James L. Cannella and Thomas F. Daley

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REVERSED IN PART AND AFFIRMED IN PART.

Defendant, Polaris Insurance Company, Ltd. (Polaris), appeals from several trial court orders [1] finding it for contempt of

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[1] In Polaris' Motion For Devolutive Appeal, they appeal
"...from all previous Orders of this Court... but particularly including, without limitation the final judgment entered on October 29, 1996 by this Court,
striking all pleadings of Polaris Insurance Company. Ltd. for failure to post a bond; the order of this Court of October 29, entering a preliminary default; the Order of October 28, 1996 entered at 8:25 AM ordering that a Bond be posted by 12 Noon on October

court, failure to comply with discovery and failure to post a bond as an unauthorized insurer. We reverse in part and affirm in part.

On May 12, 1995, plaintiff filed a suit under the Jones Act [2] general maritime law and for maintenance and cure, for

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28 or a preliminary default would be entered; the Order and Judgment issued the afternoon of Friday, October 25,1996 ordering Polaris to obtain and post a bond by 12:00 noon, October 28, 1996, and all prior Orders including the Order striking the plea of limitation of liability and all other prior Orders and Judgments' (emphasis added).
Because of the imprecise language of the Motion For Devolutive Appeal, in brief the Assignments of Error, their argument and attached copy of only one judgment, this court was placed in the difficult position of determining which judgments and orders Polaris was appealing. The following is a list of the eight judgments and orders which this court considers appealed from herein:
1. Judgment on Motion To Compel Discovery dated August 5, 1996, after hearing on August 2, 1996.
2. Judgment and Reasons dated October 9, 1996, after hearing, on October 4, 1996.
3. Order dated October 25, 1996
4. Judgment dated October 28, 1996, after hearing on October 25, 1996.
5. Order of Preliminary Default dated October 29, 1996.
6. Judgment and Reasons dated October 29, 1996, after hearing on same day.
7. Judgment dated November 4. 1996, after hearing on October 29, 1996.
8. Judgment dated January 6, 1996 after hearing on November 15, 1996.

[2] 28 U.S.C. § 1333.

injuries he sustained to his back in an accident onboard the Q/B MAG II on October 21, 1994.[3] He initially filed suit against defendants, Magnolia Quarterboats, Inc. (Magnolia) and Maintenance Dredging, Inc. (Maintenance).

Maintenance filed a third-party suit against Polaris on September 20, 1995, asserting that Polaris provided insurance coverage for the claim and owed it a defense and indemnity. Polaris was alleged to be incorporated and/or registered in the British Virgin Islands (BVI), with their main office in San Juan, Costa Rica. On October 2, 1995, plaintiff added as defendants, Magnolia Holdings, Inc., as the owner of the vessel, and Polaris, as its' insurer. In its' answer, Polaris denied that it provided insurance coverage to Magnolia Holdings Inc. or Maintenance or Magnolia (the three companies are hereinafter referred to as M/H).[4]

In August of 1996, plaintiff and M/H filed a series of motions against Polaris for discovery, for sanctions for failing to comply with discovery and for the posting of a bond as an unauthorized insurer, pursuant to La. R.S. 22:1255. The latter was based on discovery that Polaris' name had been struck from the rolls of insurers in the BVI and that it was not authorized to do business in Louisiana or any other state. The trial judge issued orders for discovery relative to motions filed by either plaintiff or M/H or by those parties jointly. The discovery was aimed at obtaining the correct insurance policies and the language in the policies on which Polaris was basing its denial

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[3] In March of 1996, the maintenance and cure claim -A-as severed and set for expedited hearing. Plaintiff settled the maintenance and cure demand in July of 1996.

[4] For the purposes of this appeal, plaintiff and defendants, M/H. are aligned..

of coverage for this accident. Movers tried to obtain certified copies of the policies, applications and a quote letter provided to M/H by Polaris. They also attempted to obtain documents related to Polaris' status as an unauthorized insurer. However, Polaris' responses were unsatisfactory to the movers.

In August and September of 1996, plaintiff and M/H filed motions to compel discovery and motions for sanctions and to strike Polaris' answers for failure to comply with discovery orders. A hearing was set for October 4, 1996. Trial had been set for October 8, 1996.

On August 5, 1996 and in September of 1996, the trial judge issued orders relating, to discovery requests by plaintiff and M/H, individually filed in April and September of 1996.

On October 2 and 3, 1996, plaintiff and M/H filed additional motions to strike Polaris' answers, two motions to strike the pleadings based on R.S. 22:1255, a motion to file a supplemental memo on the issues raised in plaintiff s motion to compel, and another motion to compel and for sanctions by M/H for failure to comply with the discovery order. On October 4, 1996, plaintiff filed a motion to file a supplemental memorandum regarding, the bond issue. These matters were set for hearing on October 4, 1996, the date previously set for hearing on the earlier filed motions.

On October 4, 1996 the hearing was held. On October 9, 1996, the trial judge rendered a judgment.

The judgment granted plaintiff's and M/H's motions to compel discovery of the applications, correct policies and any documents all which Polaris based its denial of coverage. She "held in abeyance" a ruling on the motions to strike the pleadings urged on the basis of La. RS 22:1255. Trial on the merits was reset for October 29, 1996.

On October 15, 1996 and October 17, 1996, plaintiff and M/H filed motions for sanctions and for adverse presumptions against Polaris for their alleged failure to respond properly to the orders of October 9, 1996. They also filed a joint motion to file a supplemental memorandum and for a reconsideration of the Motion To Strike Pleadins Filed By Polaris. R.S. 22:1255. An expedited hearing was set for October 25, 1996.

On October 21, 1996, plaintiff and M/H filed a motion to order a representative of Polaris to appear at the hearing, set for October 25, 1996 and to provide documents related to their status as an alleged unauthorized insurer. That motion was granted on the same day (four days before the opposition to the motions to strike and for
the adverse presumptions.[5]

On October 24, 1996, plaintiff and M/H filed a motion to file a joint supplemental memorandum in support of the motion to strike the pleadings based on R.S. 22:1255.

On October 25, 1996, the hearing convened. However, Polaris' representative failed to appear or produce any documents relative to the issue of it's status as an unauthorized insurer. Counsel for Polaris participated in the hearing by telephone. In open court and in the judgment dated October 28,1996, the trial judge granted the motions, applied the adverse presumptions and assessed a $1,500 fine against Polaris for its failure to appear as ordered with the documents requested.

The judgment applied the adverse presumptions, as follows, stating:

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[5] There was another document opposing a motion filed by plaintiff and M/H to strike Polaris' amended answer that had asserted the defense that the structure was not a vessel. That issue is not before us.

1. That the failure of Polaris to
hearing,.) On the next day, Polaris responded with an
"...produce the insurance quote of October 6, 1993 in contravention of discovery requests and Court Order gives rise to an adverse presumption that the October 6, 1993 letter would have contained information adverse to the position of Polaris Insurance Company, Ltd. that it did not quote for crew coverage...

2. That

" - - -the failure of Polaris Insurance Company, Ltd. to comply with the Court Order regarding the production and identification of the applications for insurance ... precludes Polaris ... from introducing into evidence any information regarding applications for insurance other than those which Polaris...had earlier produced, and further gives rise to an adverse presumption against Polaris... that the applications which were produced indicate that crew coverage was requested by Magnolia Holdings, Inc. and Maintenance Dredging, Inc."

The trial judge next granted the Joint Motion to File Supplemental Memorandum and For Reconsideration Of Motion To Strike Pleadings Filed By Polaris Insurance Company, Ltd. for Polaris' failure to comply with La. R.S. 22:1255 and ordered Polaris to post a bond in total amount of $550,000 by noon on Monday, October 28, 1996. The judgment states that, if the bond is not posted timely, the pleadings filed by Polaris "shall be struck from the record and the Clerk of Court shall enter a Preliminary Default against Polaris Insurance Company, Ltd."

The trial judge further found Polaris to be in contempt of court for failing to appear and produce documents at the hearing, as it was ordered to do in the judgment of October 21,

1996 and by virtue of the subpoena duces tecum issued October 21, 1996. For this violation, the trial judge ordered Polaris to pay a fine of $1,500 to plaintiff and M/H. She further ordered Polaris to pay the fine and produce the subpoenaed documents at the office of plaintiff's counsel by Monday, October 28, 1996 at 12:00 noon, CST. Thus, Polaris was required to pay the $1,500 fine, to post bond and again to produce the documents by noon of October 28, 1996. Polaris did not ask for an extension, a stay order or any other relief.

On October 29, 1996, pursuant to a written motion filed in open court by plaintiff and M/H, the trial judge entered a preliminary default against Polaris on the issue of coverage for Polaris' failure to post the bond (in accordance with the provisions of the October 28, 1996 judgment). Polaris paid the $1,500 fine to the trial court.

Also on October 29, 1996 following various outstanding motions. However, there was no motion to set a hearing on this case, or order setting a hearing on this date in the record. Both of Polaris' attorneys were present because this was the date set for trial. The trial was apparently continued again, This time without date.

Following this hearing, the trial judge rendered a decision in open court, ordering Polaris to perform certain acts by November 4, 1996. However the written order was not signed until November 4, 1996. The judgment:

1. Struck all of Polaris' pleadings in the case, pursuant to the Joint Motion to Strike, for failure to comply with La. R.S. 22:1255 and for failing to post bond as ordered.

2. Awarded $2,500.00 as sanctions against Polaris, pursuant a joint oral motion based on Polaris' failure to pay the fine of and to produce the documents as ordered.

3. Further states that

" ... if Polaris continues in contempt in any respect by continuing to fail to pay all fines now due or by continuing to fail to produce the documents Ordered by 5:00 p.m., CST, Thursday, October 31, 1996, they are additionally fined $3,500; if Polaris continues in contempt in any respect of this Court's orders by 9:00 a.m. CST on Monday, November 4, 1996, Polaris shall be fined an additional $5,000. "

4. Ordered all of the contempt fines to be paid into the court registry for the benefit of plaintiff and M/H.

On November 6, 1996, plaintiff and M/H filed a joint petition for a Judgment Debtor Rule against Polaris for the amount of all of the monetary sanctions and for the production of certain documents pertaining to Polaris' ability to pay the fines. That hearing was set for November 15, 1996.

On November 15, 1996 at 8:42 a.m., Polaris filed a Motion for Devolutive Appeal. (See footnote 1). The motion for appeal was granted on the same date.

Also on November 15, 1996, the judgment debtor rule was heard. However, again, no one from Polaris appeared, other than counsel, and no documents were produced.

On January 6, 1997, the trial judge found Polaris in contempt of court for failing to comply with the Judgment Rule. The trial judge fined them Debtor $100 per day, continuing until they paid all fines and "Polaris brings itself into compliance with this Court's orders".

In May of 1997, this court dismissed the appeal because the matters were interlocutory in nature and not appealable. Subsequently, the Louisiana Supreme Court remanded the case to this court for consideration of the merits under our

supervisory jurisdiction. The case was then docketed and set for argument on the regular appellate docket.

The issues on appeal are the validity of Judgments ordering, payment of contempt fines, the striking of the pleadings and the adverse presumptions.

A) CONTEMPT FINES - Judgments of October 28, 1996 and November 4,1996.

B) DEBTOR JUDGMENT RULE - Judgment of January 6, 1997.

The judgments rendered on October 28. 1996, November 4, 1996 and January 6, 1997 ordering the payment of contempt fines, are invalid.

Contempt proceedings in civil cases are regulated by La. C.C. P. art. 221 and La. R.S. 13:4611, La. C.C.P. art. 224 provides in pertinent part:

A constructive contempt of court is any contempt other than a direct one.

Any of the following acts constitute a constructive contempt of court:

(2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court;

La. C.C.P. art. 227 provides:

A person may not be adjudged guilty of a contempt of court except for misconduct defined as such, or made punishable as such, expressly by law.

The punishment which a court may impose upon a person adjudged in contempt of court is provided in La. R.S. 13:461 1, which provides in pertinent part:

Except as otherwise provided by law:
(1) The supreme court, the courts of appeal, the district courts, family courts, juvenile courts and the city courts may punish a person adjudged guilty of contempt of court therein, as follows...

(d) For any other contempt of court, including disobeying an order for the payment of child support or alimony or an order for the right of visitation, by a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both. [Emphasis added.]

To find a person guilty of constructive contempt, it is necessary to find that he or she violated the order of court intentionally, knowingly and purposefully, without justifiable excuse. In making this determination, the trial court is vested with great discretion. City of Kenner v. Jan P. Jumonville, Placide Jumonville, 1997 WL 52601 l, p 5,6. 97-125 (La. App. 5" Cir. 8/27/97); Reeves v. Thompson, 95-0321 (La. App. 4th Cir. 12/11/96), 685 So.2d 575,579. Proceedings for contempt must be strictly construed, and the law does not favor extending their scope. Estate of Graham v. Levy, 93-0636, 93-0134 (La. App. 1" Cir. 4/8/94), 636 So.2d 287,290, writ denied, 94-1202 (La. 7/l/94), 639 So.2d 1167.

Constructive contempt may be found on a rule to show cause, with defendant being allowed at least forty-eight hours, from the date he or she receives notice, to prepare a defense. La. C.C.P. art. 225. The motion for the rule may issue on the court's own motion or on motion of a party and shall state the facts alleged to constitute the contempt. Id. The due process limitations on summary contempt procedures were discussed in

State v. Watson, 465 So.2d 685, 687 (La. 1985), the court stated:

In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) discusses the due process limitations on summary contempt procedures:

Except for a narrowly limited category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires ... that the accused be accorded notice and a fair hearing as above set out." 333 U.S. at 275, 276, 68 S.Ct. at 508, 509, 92 L.Ed. at 695.

Pittman Const. Co., Inc. v. Pittman, 96-1079 (La. App. 4h Cir. 3/12/97), 691 So.2d 268, 273.

Furthermore, a contempt proceeding is designed for the vindication of the dignity of the court rather than for the benefit of a litigant. Nungesser v. Nungesser, 558 So.2d 695,701 (La. App. 1" Cir. 1990). Thus, the court cannot order a fine or penalty to be paid to a litigant because such payment does not vindicate the court. City of Kenner v. Jan P. Jumonville,

Placide Jumonville, 1997 WL 52601 1, p 8. The fine must be made payable to the court itself. Id.

First, the contempt order in the judgment of October 28, 1996 relates to the Joint Motion for Representative to Appear and for production of documents related to Polaris' defense that it is exempt under R.S. 22:1255 from posting a bond. The motion was timely filed and served on October 21, 1996 for the hearing on October 25, 1996. However, Polaris neither appeared at the October 25, 1996 hearing nor produced the documents showing their status as an authorized or registered insurer in the BVI. Because they failed to obey that order, the trial judge found them in contempt of court and ordered them to pay a fine of $l,500. However, no rule to show cause was filed as to why Polaris should not be found in contempt of court, much less giving them 48 hour notice of the hearing. Furthermore, we note that the fine was excessive under R.S. 13:461 1 and was awarded to plaintiff and M/H, rather than the court. Since this contempt finding was based on a judgment which failed to follow the rules of court for notice and hearing in violation of Polaris' due process rights, it is invalid. Thus, we reverse the October 28, 1996 judgment, insofar as it holds Polaris in contempt of court for failing, to appear at the October 25, 1996 hearing, and we vacate the $1,500 fine.

Second, the November 4, 1996 judgment is also invalid for the same reasons. That judgment ordered escalating fines based on a hearing held October 19, 1996. However, there was neither a rule to show cause filed stating the basis for the contempt, (for failure to pay the fine, post the bond, or produce the documents as ordered in the judgment of October 28, 1996), nor did a notice issue to Polaris that there would be a contempt hearing on that date. In addition, the fines exceeded the permissible $500 maximum under R.S. 13:4611 and were erroneously awarded to the litigants. We find a further serious deficiency in the judgment in that it ordered Polaris to perform

certain acts on October 31, 1996 and November 4, 1996, which was before the judgment was actually rendered on November 4, 1996. Because due process was not accorded Polaris in the matter of these contempt fines, the judgment assessing them is also reversed and the fines set aside.

In her November 4, 1996 judgment, the trial judge struck Polaris' pleadings because it failed to post the bond on October 28, 1996. This was neither a contempt nor sanctions ruling. Sanctions relate to discovery and contempt remedies are either fines or incarceration. Once the trial judge determined that Polaris was not exempt from posting the bond, she was mandated by R.S. 22:1255 to strike Polaris' pleadings for failing to post bond. Thus, no notice or hearing was required on this issue.

In reference to the judgment debtor rule, Polaris was obligated to attend and comply with the rule's request, whether or not it agreed.[6] Nonetheless, the subsequent judgment on January 6, 1996, awarding the parties contempt fines for failing to appear at the judgment debtor rule is also invalid, because it was rendered without compliance with the timely notice and hearing requirements of the contempt articles, La. C. C. P. arts. 221-227. Therefore, the judgment of January 6, 1997 is also reversed and the fines vacated.

C) APPLICABILITY OF R.S. 22:1255. Judgment of November 4, 1996.

Polaris argues that the trial judge erred in striking its pleadings because it is exempt from the bond requirement. Polaris asserts that it issued marine protection and indemnity

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[6] Prior to the rule being heard, Polaris filed its' Devolutive Motion for Appeal of all of the judgments. Nonetheless, this judgment is before us under our supervisory jurisdiction.

policies, which are excluded from the provisions of R.S. 22:1249 et seq., regulating unauthorized insurers. It cites R.S. 22:1249 B.(7) and Marine Marketing Services. Inc. v. Louisiana Department of Insurance, 95-1879 (La. App. 1ST Cir. 5/10/96), 673 So.2d 335.

In Marine Marketing Services. Inc., the Commissioner of Insurance attempted to apply the unauthorized insurer provisions to a broker who had sold insurance policies covering recreational marine vessels. The Commissioner claimed that the sale of policies on recreational vessels was not included in the exemption under 22:1249 B(7). However, the court of appeal held that the sale of protection and indemnity insurance on recreational vessels fell within the marine exception to the statutory definition of transacting, business of insurance by an unauthorized insurer in R.S. 22:1249 B(7). This case is inapplicable. Here, the issue is whether the marine insurance exception also acts to exempt the marine insurer from posting a bond or obtaining a certificate of authority before it can file pleadings in defense of a lawsuit.

Part XXVII, of the Louisiana Insurance Code regulates unauthorized insurers doing, business in Louisiana. La. R.S. 22:1249, et seq. R.S. 22:1249 provides in part:

§ 1249. Transacting a business of insurance by unauthorized insurer defined

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer is defined to be transacting, an insurance business in this state...

B. This Section shall not apply to...

(7) Insurance on vessels, crafts, hulls, cargoes, marine builders risks, marine protection and indemnity or other risk

including strikes and war risks commonly insured under ocean or wet marine forms of policy.

Thus, an exclusion is made for insurers placing, and delivering marine protection and indemnity insurance and hull insurance in the definition of "transacting an insurance business".

La. R.S. 22:12:55 provides:

§ 1255. Requirements to be met before using courts

A. Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (1) file with the clerk of the court in which such action, suit or proceeding is pending, a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; or (2) procure a certificate of authority to transact the business of insurance in this state...[7]

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[7] The remainder states:

B. The court in any action, suit or proceeding in which service is made in the manner provided in Sub-sections B or C of 22:1253 may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Sub-section A of this Section and to defend such action.

C. Nothing in Sub-section A of this Section is to be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Sub-sections B or C of R.S. 22:1253 on the ground either (1) That no policy or contract of insurance has been issued or delivered to a citizen or resident of this state or to a corporation authorized to do business therein, or (2) that such insurer has not been transacting business in this state, or (3) that the person on whom service was made pursuant to Sub-section C of R.S. 22:1253 was not doing any of the acts therein enumerated.

La. R.S. 22:1254, the provision immediately before R.S. 22:1255 states:

§ 1254. Use of courts; prohibited to unauthorized insurer

No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding, in this state to enforce any right, claim or demand arising out of the transaction of business in this state until such insurer shall have obtained a certificate of authority to transact insurance business in this state. Nothing in this Section shall be construed to require an unauthorized insurer to obtain a certificate of authority before instituting or filing or
causing to be instituted or filed any suit, action or proceeding either in connection with any of its investments in this state or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

R.S. 22:1254 specifically says that "No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this state to enforce any right, claim or demand arising out of the transaction of business in this state... " Thus, when the non-exempt unauthorized insurer seeks redress from Louisiana courts for a claim arising out of its transaction of business, the non-exempt unauthorized insurer has no choice. It must obtain a certificate of authority. Presumably, the exempt unauthorized insurer under La.

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R.S. 22:1255, on the other hand, states "Before my unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall... " Thus, when unauthorized insurer is a defendant, it has to file a bond, or it can choose to become an authorized insurer. This is to insure that the injured party will be able to collect payment of a judgment against the unauthorized insurer. Otherwise, the injured party will have no

financial recourse. We find that this includes maritime insurers because, whereas the state of Louisiana may not want to

1. regulate" marine insurance for various reasons, such as the international scope of maritime activities, this provision does not "regulate" maritime insurance in regard to the transaction of marine insurance business.[8]

Instead, like R.S. 1254, it regulates access to the courts. When the marine insurer uses the court system as a plaintiff, the state has no strong policy reason for overriding, its exemption and requiring the marine insurer to become authorized. Thus, it may pursue a lawsuit without complying with La. R.S. 22:1254. However, a different policy arises when the insurer is a defendant. As a defendant, the insurer must be accountable in the event of a judgment against it. R.S. 22:1249 B(7) only exempts it from regulation of its activities while "transacting the business of insurance" in Louisiana. It does not exempt it from being a responsible judgment debtor. If any unauthorized insurer, including maritime, does not want to show that it

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[8] R.S. 22:1250 authorizes the Commissioner of Insurance to sue unauthorized insurers violating the law or Code.

R.S. 22:1251 prohibits a domestic insurer from issuing policies in another state unless authorized, with some exceptions.

R.S. 22:1252 prohibits any person in this state from acting for an unauthorized insurer in any respects, with certain exceptions.

R.S.22:1253 designates the secretary of state as attorney for service of process for any 'foreign' or 'alien' unauthorized insurer who transacts business in this state without authority.

R.S. 22:1254 and 22:1255 (See above.)

R.S. 22:1256 declares policies void that are issued in violation of the provisions of the Codes, except by the insurer.

R.S. 22:1257-1270 regulate when and the manner in which brokers can place unauthorized insurance.

R.S. 22:1269 exempts, among others, ocean marine insurance from the provisions of R.S. 22:1256-1270, except that the surplus line broker must comply with R.S.22:1262, even for placement of ocean marine insurance.

R.S. 22:1262 requires the insurer to deposit with the Commissions a guarantee or bond for the prompt payment of claims arising out of the insurance contract.

intends to act responsibly in the event of a judgment against it, by either posting a bond or becoming authorized by the state, it should not be permitted to file pleadings and present a defense to a lawsuit in this state. The public policy of the state of Louisiana requires even a maritime insurer to be accountable for its debts in Louisiana. [9] Since R.S. 22:1255 does not regulate the transacting of maritime business, we find that the trial judge did not err in finding, that Polaris is not exempt from the requirements in R.S. 22:1255 and ordering it to post a bond.

We point out that, even if this court were to find that Polaris is exempt from the bond requirement, they failed to seek relief from the order. At the time the pleadings were struck, the order was in effect and Polaris was bound to obey the order or suffer the consequences. Polaris' remedy was to immediately either post the bond or ask for a stay order and then seek supervisory relief in the appellate court. See: State in Interest of J.B., 499 So.2d 611, 613 (La. App. 5 h Cir. 1986). Therefore, we find that the trial judge did not err by striking-Polaris' pleadings in the November 4, 1996 judgment. This part of the judgment is affirmed.

D) SERVICE OF PLEADINGS: Hearings of October 4,1996, October 25, 1996 and October 29,1996.

Polaris next asserts that the order to post security was decided on the basis of a memorandum that was improperly served and exhibits that were not served on counsel. Polaris argues that the supplement and exhibits were required to be served 72 hours before the hearing and that service by fax was

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[9] "We note that under R.S. 22:1262, an unauthorized insurer must provide a guarantee or bond, when a surplus line broker is involved. This includes ocean marine insurance specifically for the payment of claims arising out of the insurance contract.

not permitted in 1996, under the Code of Civil Procedure. It also argues that the trial judge erred in granting the renewed motion because there was no new evidence in the matter.

First, the matter of the bond requirement was not a new issue or a renewal of one that had already been decided, but one that had been pending since October 9, 1996. In the judgment of October 9, 1996, the trial judge held a decision on this issue in abeyance. Thus, the trial judge did not err in permitting - plaintiff and M/H to reargue the motion later.

The law applicable in 1996, provided, as it still does, that it is unnecessary to serve on the adverse party a copy of a written document that is an exhibit to a pleading, unless the party filing the pleading prays for service. La. C.C.P. art. 131 1. Thus, service of the exhibits was not required by Louisiana law. However, service of a pleading and exhibits is required under the 24 h Judicial District Court rules, no sooner than 72 hours before the hearing, if another time is not set by law or the court. Rules of the 24th Judicial District Court, Civil Rule XVI and XVII. It is unclear whether Polaris is complaining about the hearing on October 4, 1996 or October 25, 1996. However, we have reviewed all of the pleadings for all of the hearings in this case.

Service was timely on all pleading for the October 4. 1996 hearing (judgment on October 9, 1996), other than those filed October 3 and 4, 1996: the First Motion to Strike based on R.S. 22:1255 by plaintiff, a similar one filed by M/H, a supplemental memo on the production issue by plaintiff, and a Motion for Sanctions relative to the production of documents issue. [10]

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[10] Filed October 3, 1996 the first Motion to Strike based on R.S. 22:1255: Plaintiff filed this first motion to strike all of Polaris' pleadings under R.S. 22:1255, with two exhibits consisting of, Polaris' admission in a federal case that it is not authorized in Louisiana and its answers herein denying it does business in Louisiana.

Service October 2. 1996 was by facsimile and first class mail.
An expedited hearing was set for October 4, 1996. This was untimely served.

Filed October 3, 1996 - Supplemental Memo: Plaintiff filed this Supplemental Memo on the issue of sanctions for failing to comply with the production of documents relative to the policies and an endorsement, alleging different language in the various documents, making it impossible to know which was the correct policies and endorsement. Ten exhibits were attached: policies, requests for admissions, responses and exhibits to the pleadings, letters from Polaris to the agency that placed the insurance with different language cited for Endorsement 8 which was supposed to relate to crew coverage, a sample of endorsement 8 with different language, the policy sent to plaintiff, the affidavits and letters indicating the law of Costa Rica relative to certified copies and correspondence between the parties' attorneys.
Service October 2, 1996 was by facsimile and first class mail.
A hearing was set for October 4, 1996. This was untimely served.

This last memorandum related to the issues argued in the motion filed in August. The hearing on this was set for October 4, 1996.

Filed October 3, 1996 - Motion to Compel and for Sanctions: M/H filed this Motion for Sanctions for failing to comply with the court's previous order of discovery rendered in a pre-trial conference on September 26, 1996. There is no written judgment or order to that effect in the record. Exhibits consisted of the Motion to Compel of September 3, 1996, Request for Production of Documents of September 3, 1996, the responses and other pleadings, a letter to M/H's prior named business, River Products, listing coverage, and the policies.
Service October 3, 1996 was by facsimile and first class mail.
A hearing was set for October 4, 1996. This was untimely served.

Filed October 3, 1996 - Motion for Security and to Strike Polaris' pleadings based on R.S. 22:1255. M/H filed for the first time a Motion for Security and to Strike Polaris' pleadings based on R.S. 22:1255.
Plaintiff s similar motion was also filed October 3, 1996. Exhibits: federal lawsuit admissions relative to not being
authorized in Louisiana, letter from insurance commissioner's office relative to not being authorized in Louisiana.
Service October 3, 1996 was by facsimile and first class mail.
Am expedited hearing was set for October 4, 1996. This was untimely served.

Polaris filed an opposition to the late motions, asserting that the bond issue should be denied for laches and because of the marine insurance exemption. They also responded that plaintiff was filing the motions and memorandums as a

Although the pleadings filed October 3rd and 4th, 1996 (for the hearing on October 4. 1996 were not filed in compliance with the rules of the 24th Judicial district.

District Court, we find that Polaris was not prejudiced. In her October 9, 1996 judgment, the trial judge simply ordered Polaris to comply with previous discovery orders and did not sanction them. Further, although the bond issue was raised for the first time one day before the hearing, the trial judge did not rule on this issue and held it in abeyance. Thus, we find no reason to reverse this judgment.

The pleadings filed in conjunction with the hearing on October 25, 1996 were timely, except for the Joint Supplemental Memorandum in Support of the Motion to Strike, asserting that Polaris is a "bogus" insurer. This was filed and served on October 24, 1996, one day before the hearing. Thus, it was not served 72 hours before the hearing, and service of that supplemental memorandum was deficient under the local rules. However, our review of the record reflects that the trial judge did not sign the order permitting this supplement to be filed. In addition, we find that the motion which she granted was the Joint Motion To File Supplemental Memorandum and for Reconsideration of Motion to Strike (based on R.S.

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delaying tactic. They contend that plaintiff knew for many months that it was not authorized in Louisiana. Notably, it had admitted in pleadings in this case that it was not authorized to do business. The only comment it made, relative to the BVI registration, was that it was appealing the decision to strike its' name from the rolls. It has not denied that it is not on the rolls of the BVI. However, Polaris also argued in brief that they would be prejudiced if ordered to obtain the bond on the eve of trial. At that time, trial was still set for October 8, 1996. Polaris also claimed that the documents requested had already been produced to the best of their ability.

Filed October 4, 1996 (morning of the hearings) - Supplemental Memorandum: Plaintiff filed a supplemental memorandum in answer to Polaris' claims that they are exempted from the bond requirements.
Service October 4, 1996 was by mail. This was untimely served.

22:1255), that was filed October 17, 1996. That motion was filed timely. Thus, she did not err in considering the issue and ordering, Polaris to file a bond pursuant to La. R. S. 22:1255.

E) ADVERSE PRESUMPTIONS: Judgment of October 28, 1996. The next issue is whether the trial judge erred in ordering that the adverse presumptions were appropriate because of Polaris' failure to comply with the production of documents.

Polaris argues that they searched their files and were unable to locate the requested "quote" letter. Further, they argue that the adverse presumptions are irrelevant and without factual basis because the policies are the contracts, not the quote letter or applications. Polaris argues that the policy itself is the evidence of insurance and that M/H and plaintiff have been in possession of the policy at all times.[11]

La. C.C.P. 1471 provides:

Art. 1471. Failure to comply with order compelling discovery; sanctions

If a party or an officer, director, or managing agent of a party or a person designated under Articles 14-42 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1469

---

[11] Polaris also argues the merits of the coverage issue, asserting that the binders that were delivered are dated the same date as the policies, which reflects that no premium for workers' compensation and employer's liability was charged. A notation states that "All crew, employees, workers and causal laborers on board must be covered by workers compensation liability insurance to the minimum of the statutory rates for the state of location of the barges at all times." Polaris argues that this indicates that M/H was required to carry separate policies for employees. However, this is an issue for the merits and is not properly before us. The coverage issue has yet to be determined.

or Article 1464, the court in which the action is pending may make such orders in regard to the failure as are just, and among, others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining, the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing, orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(5) Where a party has failed to comply with an order under Article 1464, requiring him to produce another for examination, such orders as are listed in Paragraphs (1), (2), and (3) of this Article, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Service of the pleadings relative to these particular issues giving rise to the adverse presumptions was timely.[12] The trial judge ordered the documents produced and Polaris defied the order.

Whether or not Polaris agrees with the importance of the requested documents, they were requested in pursuit of discovery and ordered to be produced. Under C.C.P. art. 1471, the trial judge was authorized to order that the matters in the documents are to be established for failing to comply with discovery. Although Polaris contended that the quote letter could not be found after a diligent search, the trial judge apparently did not believe them. Further, Polaris does not explain why the applications were not produced. In light of the often unexplained refusal of Polaris to comply with the orders of the court in this case, we find that the trial judge did not abuse her discretion in applying the adverse presumptions.

Accordingly, the judgment of October 29, 1996 is affirmed.

The judgment of October 28, 1996 is affirmed in part and reversed in part. It is reversed insofar as it holds Polaris in contempt for failing to appear at the hearing on October 25, 1996. Therefore, the fine assessed against Polaris of $1,500 for that contempt is vacated.

The judgment of October 28, 1996, effecting the adverse presumptions against Polaris, is affirmed in part and reversed in part. It is affirmed insofar as it strikes Polaris' pleadings for failure to post a bond in compliance with R.S. 22:1255. It is reversed as to the contempt findings and the

---

[12] The motion was filed October 1,1996 and served October 11, 1996 by first class mail. The hearing was set and held on October 25, 1996.

fines therein are hereby vacated. The judgment of January 6, 1997 is reversed in its entirety.

Costs in this matter are to be paid by Polaris.

REVERSED IN PART AND AFFIRMED IN PART.

APPENDIX C
JUDGMENT ON MOTION TO COMPEL DISCOVERY
AUGUST 5th ORDER

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"
CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL
FILED: _____ DEPUTY CLERK _____

JUDGMENT ON MOTION TO COMPEL DISCOVERY

The Motion to Compel Discovery of Charles J. Brunet, plaintiff herein, came on for hearing on the 2nd day of August, 1996.

Appearing herein are the following:

CHARLES J. BRUNET
through his attorney,
Richard A. Weigand, Esquire

When, after considering the law, the evidence and the pleadings, and for reasons orally assigned;
IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Compel Discovery of plaintiff, Charles J. Brunet, be granted. Defendant, Polaris Insurance Company, Ltd., is ordered to comply with plaintiff's Request for Production Number 4 dated January 15, 1996 by producing to plaintiff

certified copies of all policies of insurance. Additionally, Polaris Insurance Company is to answer Interrogatory Number 8 of Plaintiff's First Set of Interrogatories dated January 15, 1996, stating more completely whether the policies of insurance produced in response to Request, Number 4 provide coverage and, if not, defendant is to state with specificity, citing provisions of the policies thereof, the reasons that the policies do not provide coverage. Defendant, Polaris Insurance Company this Order within fourteen days or by no later than August 16, 1996.

JUDGMENT READ, RENDERED AND SIGNED this 5th day of August 1996.

_____

JUDGE

ILLEGIBLE SIGNATURE OF CLERK

DATED AUG. 6, 1996

APPENDIX D

JOINT SUPPLEMENTAL MEMORANDUM

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: _____ DEPUTY CLERK _____

JOINT SUPPLEMENTAL MEMORANDUM IN SUPPORT OF POLARIS INSURANCE COMPANY, LTD., FOR FAILURE TO COMPLY WITH LA-REV. STAT. SECT. 22:1255 OR TO REQUIRE POSTING OF BOND PURSUANT TO LA-REV. STAT. SECT. 22:1255

MAY IT PLEASE THE COURT:

1.
POLARIS IS BOGUS INSURANCE COMPANY

"Facts"

Polaris is an alien entity (EXHIBIT-1). It has its principal place of business in the Country of Costa Rica in Central America (EXHIBIT-2, EXHIBIT-2A and EXHIBIT-2B). Prior to February of 1993, it was allegedly "on the rolls" of the British Virgin Isles. Whether this means that it was

incorporated in the British Virgin Isles, or licensed as an insurance company in the British Virgin Isles, is not clear from the letter dated January issued by the government of the British Virgin Isles -3). However, it is clear that at this time, Polaris is (EXHIBIT
neither incorporated, nor licensed as an insurance company, by the government of the British Virgin Isles (EXHIBIT-3, EXHIBIT-3-k and EXHIBIT-4). The Court should note that Polaris does not have its principal place of business in the British Virgin Isles, but in the separate and distinct Central American country of Costa Rica (EXHIBIT-2A) Polaris argues that its problems with the government of the British Virgin Isles is merely procedural and of no substance, and that it has appealed the action of February of 1993 striking them from the rolls (EXHIBIT-4) Polaris has offered no evidence in support of this argument. Polaris has not offered any proof that it is a legitimate corporation, or that it can lawfully issue policies of insurance. The only evidence is a self serving statement by Polaris in Responses to Requests for Admissions that the government of the British Virgin Isles authorized Polaris to service policies already issued (EXHIBIT-4). Yet, Polaris has offered no documentation from the British Virgin Isles in support of this statement. Further, the policies at issue in this case were written in November of 1993, subsequent to Polaris being struck from the rolls in February of 1993 (EXHIBIT-23). There is no proof that Polaris is authorized by any foreign country to do business as an insurance carrier. Polaris is therefore issuing new policies without the authority of the government of the British Virgin Isles, or any other government in any other country in the world. The policies at issue in this case, 546, 547, 001 and 002, were not lawfully issued under the laws of the British Virgin Isles or any other foreign country. Polaris' Responses to Requests for Admission (EXHIBIT-4) indicate that it was authorized only to service ;j policies and not to issue new policies.

Polaris is "not known" to the insurance commissioner of the State of Louisiana (EXHIBIT-S). Polaris is not an admitted alien insurer pursuant to LSA-R.S. 22:981 of the Louisiana Insurance Code (EXHIBIT-5). This, of course, follows for Polaris cannot be licensed, admitted, or approved in the State of Louisiana because it is neither a licensed corporation, nor an entity licensed to write insurance anywhere in the world.

"Argument"

Polaris is an alien entity holding itself out in the State of Louisiana as an insurance company. Polaris does not disclose to those who its charges a premium for insurance that it is not incorporated or licensed anywhere in the world to sell insurance. Polaris is a bogus insurance company.

NOT DIRECT PROCUREMENT

"Facts"

Policies 546 and 547 were originally issued in November of 1993 for providing coverage for the period of 11/6/93 through 11/6/94. At the bottoms of the Declarations Pages of these policies is Language which clearly states that the policies were issued through an insurance agent, Fogg Insurance Agency [EXHIBIT-2B 1 and -EXHIBIT-29 2))] Subsequently and on or about January 11, 1994, policies 546 and 547 were reissued bearing certificate numbers 001 and 002 respectively. Polaris attempted to reissue 546 and 547 (new policies 001 and 002, EXHIBIT-2B(3) and EXHIBIT-23(4)_, respectively) as direct procurement to avoid taxation by the State of Louisiana. However, neither the manner in which the policies were originally procured or reissued comply with the legal requirements to be direct procurement as provided by LSA-R.S. 22:1249 (b) (8) and which reads as follows:

B. This Section shall not apply to:

(8) Transactions involving risks located in this state where the policy or contract of insurance for such risk was principally negotiated and delivered outside this state, and was lawfully issued in a state or foreign country in which the foreign or alien insurer was authorized to do an insurance business, and where such insurer has no contact with this state except in connection with inspections or losses required by virtue of he contract or policy of insurance covering the risk located in this state, including transactions involving the operation of worker's compensation claims offices pursuant to R.S. 23:1161.1.

Keith Fogg of the Fogg Insurance Agency negotiated and handled all negotiations associated with the issuance (EXHIBIT-7A and EXHIBIT-7B) and re-issuance (EXHIBIT-8A) of the policies on premiums paid by Magnolia/Maintenance. Keith Fogg of Fogg Insurance Agency receives a commission whether acting as agent or as a consultant. The commissions were paid even after the alleged direct procurement (EXHIBIT-9A and EXHIBIT-9B). Polaris clearly has contacts in and with the State of Louisiana in negotiating, selling and delivering policies of insurance. As stated by Polaris. in its responses to requests for production for the policies, the original policies were delivered to Magnolia/Maintenance (EXHIBIT-2A).

"Argument"

As Polaris is a bogus insurance company, the policies were not lawfully issued in which a foreign or alien insurer was authorized to do business. None of the policies issued by Polaris in this case were procured directly from Magnolia/Maintenance Dredging as the manner in which they were issued, negotiated and delivered does not comply with the requirements of direct procurement as set forth in LSA-R.S. 22:1249(b) (8)

"LSA-R.S. 22:611 DOES NOT APPLY 0 LSA-R-S- 22-1255

LSA-R.S. 22:611, in pertinent part, reads as follows:

A. The applicable provisions of this Part shall apply to insurance other than ocean marine and foreign trade insurance ... [emphasis added].

LSA-R.S. 22:611 is contained in Part XIV of the Louisiana Insurance Code. LSA-R.S. 22:1255 is in Part XXVII of the Louisiana Insurance Code. The clear language of LSA-R.S. 22:611 states that it's language applies only to Part XIV of the Louisiana Insurance Code.

IV.

LACHES

Polaris argues that it is too late to bring a LSA-R.S. 22:1255 Motlon, but yet, it does not cite any legal authority for this argument. It argues that the present Motion is a "brass attempt to extort settlement". To the contrary, this is a Motion invoking the laws of the Insurance Code of Louisiana to ensure that the Judgment of this Court is enforceable and collectible. There is no hope of settlement in this case for Polaris has made it clear that it will not settle and that plaintiff will have to petition the courts of Costa Rica to enforce any Judgment of this Court.

V.

CONCLUSION

Polaris, an alien entity not incorporated anywhere in the world, not licensed, approved or admitted as an insurance company anywhere in the world, an entity who has been struck

from the rolls in the British Virgin Isles and has offered no proof as to the reason why it was struck from the rolls of the British Virgin Isles and who is negotiating and delivering policies of insurance to corporations of this State, has the unmitigated gall to argue to this Court that the laws of the State of Louisiana do not apply to them - that there is a loophole in our insurance laws that permits an alien entity to write insurance in this State and if cast in Judgment as Mr. Giambrone stated in Open Court on October 4, 1996, that the Judgment Creditor would have to go to the Courts of Costa Rica to collect the Judgment. Polaris blatantly argues that it issued bogus or misleading policies or certificates of insurance to provide to the United States Army Corps 'of Engineers that did not provide the coverage required by the Corps and states as the reason that Polaris charged a premium only a fraction of what insurance should cost! Accordingly, this Court must Order that Polaris' pleadings be struck from the record unless it posts a bond pursuant to LSA-R.S. 22:1255 in an amount this Court deems sufficient to pay any Judgment rendered herein against Polaris in this matter.

Respectfully submitted

Richard Weigand, T.A. (#13324)
WEIGAND, LEVENSON & COSTA
427 Gravier Street, Ground Floor New Orleans, LA 70130
Telephone: (504) 568-1256
COUNSEL FOR PLAINTIFF,
CHARLES J. BRUNET

Carl J. Hebert, T.A. (#6724)
EVANS & COMPANY
220 Camp Street
New Orleans, LA 70130
Telephone: (504) 522-1400
COUNSEL FOR MAGNOLIA HOLDINGS, INC., MAGNOLIA QUARTERBOATS, INC. AND MAINTENANCE DREDGING, INC.

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that Joint Movers, be and are hereby granted leave of court to file the above and foregoing Supplemental Memorandum.

GRETNA, Louisiana this the (BLANK) day of October, 199G.

UNSIGNED
JUDGE

CERTIFICATE

I do hereby certify that a copy of the above and foregoing has been served, by facsimile and by Federal Express delivery, upon all counsel of record, this the 24th day of October, 1996.

Richard A. Weigand

APPENDIX E

TRANSCRIPT EXCERPTS SHOWING THE PLAINTIFF'S REFERENCE TO THE JOINT SUPPLEMENTAL MEMORANDUM AND ITS EXHIBITS

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

CHARLES J. BRUNET NO. 478-181 vs.
MAGNOLIA QUARTERBOATS,
INC., ET AL. DIVISION "I"

Proceedings taken in the above numbered and entitled cause in open Court at Gretna, Louisiana, on October 25, 1996, before the Honorable Jo Ellen Grant, Judge presiding.

APPEARANCES:
For the Plaintiff:
Richard A. Weigand
For the Defendants:
Carl J. Hebert
(For Magnolia Holdings Corporation, Maintenance Dredging and Magnolia Quarterboats)

Joseph L. Gimbrone (By telephone)
(For Polaris Insurance Company)

REPORTED BY: Patricia L. LaRose, OCR

EXHIBIT INDEX

EXHIBITS: RECEIVED:	DESCRIPTION	PAGE
PLAINTIFF'S EXHIBITS		
P - 1	Answers of Joseph L. Gimbrone to petition and third-party petition	34
P - 2 (A)	Original letter dated 9/28/96 from Joseph L. Gimbrone to J.Hebert	36
P - 2	Entire response by Joseph L. Gimbrone which-was attached to his letter of 9/28/96	36 37
P - 2 (13)	Policies of insurance	39
P-3	Fax dated January 16, 1996, from Government of British Virgin Islands	41
P-3(A)	Correspondence from the Supervisor of Insurance for the Government of the British Virgin Islands, dated 10/23/96 Costa Rica to New Orleans	46
P-4	Response to Requests for Admission filed in Federal Court case	47
P-5	Affidavit of Commissioner of Insurance for the State of Louisiana	47

P - 6 (A)	Part of in globo Exhibit Two	48
P - 6 (2)	Part of in globo Exhibit Two	48
P-7(A)	Part of in globo Exhibit Two	48
2 - 7 (B)	Part of in globo Exhibit Two	48
2-8	Part of in globo Exhibit Two	48
P - 9 (A)	Part of in globo Exhibit Two	48
P-9(B)	Part of in globo Exhibit Two	48
P - 10	Flight schedules from San Jose from San Jose to New Orleans	45

Hearing Transcript

It: held its ruling in abeyance, and we have again brought the matter for hearing and have additional evidence. We've prepared your Honor an exhibit book, which, if You'll follow along with me, I'll be glad to start my argument.

THE COURT

All right, which I have received yesterday and I did take a look at it.

MR. WEIGAND

Judge, Polaris - is an alien entity, has its principal place of business in the country of Costa Rica in Central America. If you'll look at Exhibit Two, you'll see the pleadings, and we've highlighted where Polaris has stated in the preface--Exhibit One, I'm sorry ..

THE COURT

Mr. Gimbrone, do you have one of these exhibit books that they're talking about?

MR. GIMBRONE:

I don't have a book. There were some exhibits that were sent with their motion.

THE COURT:

All right.

MR. GIMBRONE:

So I would ask that they tell me what exhibit they're looking at

MR. WEIGAND:

Sure, that's no problem, and he has all these anyway, your Honor.

THE COURT:

They're going to do that.
MR. GIMBRONE:
1 have to know what they are, because he prepared books for them and not for me.
MR. WEIGAND
Well,
THE COURT:
Can you hear Mr. Weigand?
MR. GIMBRONE:
Yes, I can hear him.
THE COURT:
Okay, go ahead.
MR. WEIGAND:
What the--the--I'll start over again, your Honor. Polaris is an alien entity. we attached Exhibit One, which is the answer of Polaris, not only to the original petition of plaintiff, Charles J. Brunet, but as well the answer to the third-party petition of Maintenance and Magnolia; they--in the preface of these answers, Polaris states that defendant, Polaris Insurance Company, Limited, is a foreign corporation, incorporated in the British Virgin Isles. It has its principal place of business in the country of Costa Rica, your Honor, and we attached exhibits Two, Two(A) and Two(B). Exhibit Two, your Honor--that's the in globo exhibit--which is the entire production, the October--no, the entire production of Polaris, through Mr. Gimbrone, of the

lawfully issued, under the laws of the British Virgin Isles or any other foreign country. Polaris's responses to Requests for Admission, again, Exhibit Four, indicate that it was only--if you believe it--only even authorized to service policies already issued, and not to issue new policies. Polaris is not known to the Insurance Commissioner of the State of Louisiana, Exhibit Five, that is the letter from the Louisiana Insurance Commissioner, your Honor, which I think you saw at the last hearing, as well. Polaris is not an admitted alien insurer, pursuant to the Louisiana Revised Statute R.S. 22:981 of the Louisiana Insurance Code. This, of course, follows, for Polaris cannot be licensed, admitted, or approved in the State of Louisiana because it is neither a licensed corporation, nor an entity licensed to write insurance anywhere in the world. Your Honor, Polaris is an alien entity holding itself out in the State of Louisiana as an insurance company. Polaris does not disclose to those who it charges a premium for insurance and to whom it sells insurance that it is not incorporated or licensed anywhere in the world to sell insurance. Your Honor, Polaris is a bogus insurance company. With respect to the issue of direct procurement, your Honor,

and this is something which I think your Honor, in its judgment, in which it held-- in the judgment in which it held its decision in abatement, it mentioned something about direct procurement, your Honor, so I thought I'd address it. The Policies 546 and '547 were originally issued in November of 1993 for providing coverage for the period of November 6th., .1993, through November 6Th., 1994. At the bottoms of the declaration pages of these policies is language which clearly states that the policies were issued through an insurance agent.--Fogg Insurance Company-- or Fogg Insurance Agency. That's Exhibits Two(B)(1) and Two(B)(2), your Honor. Subsequently, on--and on or about January of 1994, the policies 546 and 547 were reissued, bearing certificate numbers-- excuse me--001 and 002, respectively. Polaris attempted to reissue 546 and 547, new policies 001 and 002, which are Exhibits Two(B)(3) and Two(B)(4), respectively, as direct procurement to avoid taxation by the State of Louisiana; however, neither the manner in which the policies were originally procured or reissued comply with legal requirements to be a direct procurement, as provided by 22:1249(B)(8), and which C. J. had pointed out to the Court earlier. Your Honor, you have to do something more than simply say,

"We're going to do this by direct procurement." You have to follow the dictates of the law with respect to the definition of direct procurement. Keith Fogg, of the Fogg Insurance Agency, negotiated and handled all negotiations associated with the issuance--I have some letters, your Honor, which I've attached as Exhibit Seven(A) and Seven(B)--there are others, but those are two examples-- and reissuance, Exhibit Eight(A) of the policies on premiums paid by Magnolia Maintenance (sic). Keith Fogg, of Fogg Insurance Agency, receives a commission, whether acting as an agent or a consultant. Your Honor, you can't change the nature of what you're doing by simply calling somebody a "consultant," rather than "agent.,, The monies--the documents will show that the money was paid--even after they allegedly were doing direct procurement--the premiums were paid through Mr. Fogg. Mr. Fogg continued to receive commissions, and just as he did when he was an agent in like amounts. The commissions--Exhibit Nine(A) and Nine(B). The commissions were paid, even after the alleged direct procurement, your Honor. They have a document, which is Nine(A); it is a letter to Keith Fogg on Polaris stationery from Ana Lucrecia Mora C., and it says--it's dated January llth, 1994,

which was at the time they were trying to do this--trying to redo the issuance of 54.6 and 546 (sic), to constitute what they were calling "direct procurement." it clearly says, "We will send agency agreement for this corporation for your information when we have notice of the formation and name of the corporation.,, He opened up a corporation in Costa Rica. Mr. Fogg opened up a corporation in Costa Rica to receive monies and, well, the last sentence reads, "Commissions due on River Products and Magnolia Holdings will be credited to the new corporation, as we understand that this new that this new corporation has bought your book of business.,, Nine(B), your Honor, is a letter dated April 27th, and this shows that--excuse me--1995, and it shows that--it's a letter from Mr. Fogg to the same Ana Mora C. at Polaris, indicating that he has changed banks and asking them to forward his money to the Hibernia National Bank on Gause Boulevard in Slidell. Polaris clearly has contacts in and with the State of Louisiana in negotiating, selling, and delivering policies of insurance, as stated by Polaris in its responses to Requests for Production for the policies, which is Exhibit Two(A), your Honor, okay. it delivered--he stated in--Mr. Gimbrone, in his letter to us, dated September 28th,

APPENDIX F

DOCUMENTS ACTUALLY SUBMITTED AND REVIEWED BY THE COURT AT THE OCTOBER 25th HEARING ON WHICH THE ORDER REQUIRING A BOND WAS MADE

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: I

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: _____ DEPUTY CLERK _____

VERSUS

MAGNOLIA QUARTERBOATS, INC., ET AL.

DOCUMENTS
(ACCORDING TO THE CLERK'S NOTATIONS ON THE DOCKET OF THIS CASE)
SUBMITTED TO THE COURT BY BRUNET AND MAGNOLIA AND CONSIDERED BY THE DISTRICT COURT IN MAKING ITS DECISION REGARDING THE ISSUE OF POSTING BOND

NUMBER	DATE	DESCRIPTION	PG. #	WHERE FILED IN RECORD
	10/4/96			
P-1		DOCUMENT FROM GOVERNMENT FROM BRITISH VIRGIN ISLANDS	883	ENVELOPE
P-2		LETTER FROM JIM BROWN, SECRETARY OF STATE	883	ENVELOPE
P-3		RESPONSE TO REQUEST FOR ADMISSIONS FROM U.S. DISTRICT COURT, LA	886	ENVELOPE
P-4		COPIES OF ALL INSURANCE POLICIES IN EFFECT	888	TO BE SUBMITTED BY MR. WIGAND.
P-5		DECLARATION SHEET	922	TO BE SUBMITTED BY MR.WEIGAND
P-6		ENDORSEMENT ATTACHED TO POLICY TO AND POLARIS LETTER SHOWING NO COVERAGE	932	ENVELOPE
P-7		ENDORSEMENT	933	ENVELOPE
MAGNOLIA HOLDINGS I		RE-QUOTE FROM POLARIS WITH TWO DIFFERENT DATES	915	ENVELOPE

NUMBER	DATE	DESCRIPTION	PG. #	WHERE FILED IN RECORD
MAGNOLIA HOLDING 2		RESPONSES OF POLARIS FOR REQUEST OF DOCUMENTS	919	TO BE SUBMITTED BY MR. WEIGAND
	10/25/96			
EXHIBITT #2		ATTACHMENTS	976	BLUE BINDER
EXHIBIT #2a		LETTER FROM COUNSEL FOR POLARIS TO COUNSEL FOR MAGNOLIA DATED 9/28/96	975	ENVELOPE
EXHIBIT #2b		DISCOVERY RESPONSES OF POLARIS	978	WHEREABOUTS UNKNOWN
EXHIBIT #2b1		POLARIS INSUR - ANCE POLICY #546	978	ENVELOPE
EXHIBIT #2b2		POLARIS INSUR- ANCE POLICY #545	978	ENVELOPE
EXHIBIT #2b3		POLARIS INSUR- ANCE POLICY #001	978	ENVELOPE
EXHIBIT #2b4		POLARIS INSUR- ANCE POLICY #002	978	ENVELOPE

NUMBER	DATE	DESCRIPTION	PG. #	WHERE FILED IN RECORD
	1/25//96			
EXHIBIT #3		CORRESPONDENCE FROM GOVT. OF THE BRITISH VIRGIN ISLANDS	980	ENVELOPE
EXHIBIT #3a		CORRESPONDENCE FROM SUPERVISOR OF INSURANCE FOR THE GOVERNMENT OF THE BRITISH VIRGIN ISLANDS DATED 10/21/96	985	ENVELOPE
EXHIBIT #4		POLARIS RESPONSES TO DEFENDANTS REQUEST FOR ADMISSIONS	986	ENVELOPE
EXHIBIT #5		AFFIDAVIT OF COMMISSIONER OF INSURANCE FOR STATE OF LA. DATED 10/2/96	986	ENVELOPE
EXHIBIT #6a		CORRESPONDENCE FROM KEITH FOGG DATED 12/I/93	987	ENVELOPE
EXHIBIT #6b		CORRESPONDENCE FROM POLARIS DATED 12/2/93	987	ENVELOPE

NUMBER	DATE	DESCRIPTION	PG. #	WHERE FILED IN RECORD
EXHIBIT #7a		CORRESPONDENCE FROM POLARIS DATED 10/18/93	987	ENVELOPE
EXHIBIT #7b		CORRESPONDENCE FROM POLARIS DATED 10/20/93	987	ENVELOPE
EXHIBIT #8a		CORRESPONDENCE FROM POLARIS DATED 5/20/95 (NOT MENTIONED ON MINUTE ENTRY)	987	ENVELOPE
EXHIBIT #9a		CORRESPONDENCE FROM KEITH FOGG DATED 1/1/94	987	ENVELOPE
EXHIBIT #9b		VARIOUS CORRESPONDENCE BETWEEN POLARIS AND KEITH FOGG	987	ENVELOPE
EXHIBIT #10		SAN JOSE FLIGHT SCHEDULES	984	ENVELOPE
P-1		COPY OF DRIVERS LIC. & MERCHANT MARINE DOCUMENTS	N/A	ENVELOPE

NUMBER	DATE	DESCRIPTION	PG. #	WHERE FILED IN RECORD
	10/21/96			
P-2		COPY OF EMPLOYERS WAGE REPORT	N/A	ENVELOPE

APPENDIX G
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' JOINT MOTION TO STRIKE POLARIS' PLEADINGS

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: _____ DEPUTY CLERK _____

VERSUS

MAGNOLIA QUARTERBOATS, INC., ET AL

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' JOINT MOTION
1. TO STRIKE ALL AFFIRMATIVE DEFENSES ASSERTED BY POLARIS
2. TO EFFECT AN ADVERSE PRESUMPTION AGAINST POLARIS AND IN FAVOR OF DEFENDANTS (MAGNOLIA HOLDINGS, INC. MAINTENANCE DREDGING, INC.) AND PLAINTIFF (CHARLES BRUNET)

TO: CHARLES J. BRUNET
through HIS ATTORNEY RICHARD A. WEIGAND
427 Gavier Street, Ground Floor
New Orleans, LA 70130

TO: MAGNOLIA HOLDINGS, INC. et al.
through THEIR ATTORNEY CARL J. HEBERT
EVANS & CO.
220 CAMP STREET
NEW ORLEANS. LA. 70130

NOW INTO COURT, through undersigned counsel, comes Defendant Polaris Insurance Company, Ltd., herein after referred to as Polaris, which respectfully submits this Opposition to Plaintiffs' Joint Motion For Sanctions and for Adverse Presumption against Polaris Pursuant to article 1567 of the he Louisiana Civil Code of Procedure.

Polaris opposes same on the following grounds:

I Plaintiff's Joint Motion is unintelligible as served upon Polaris without service of the exhibits thereto.
II Polaris has made good faith compliance with the order of this court both for resolution of the October 18 / 28 letter, the October 6, 1993 letter and the Applications.
a. Polaris responded in the most expeditious fashion consistent with said court order.
b. Polaris responded as fully and completely as possible.
III Plaintiffs at all times herein had possession and control of the very documents upon which they base their motion.
a. The matter of the confusing letter in which he first page was dated October 18, 1993 and second age was dated October 28, 1993 had already been resolved on October 9, 1996.

b. The letter referred to in the October 6, 1993 after diligent search cannot be located.

c. The letter of October 6, 1996 was sent to Plaintiff Maintenance Dredging, Inc. and must be deemed equally available to-plaintiff as to defendant Polaris.

d. Plaintiffs, Motion for Adverse presumption istoo vague for this court to issue in that it is too broad and indefinite for the court to determine with any certainty exactly what reasonable presumption is appropriate and therefor rule thereon.

IV

Defendants performance in providing copies of the applications available and the binders was the best response that Polaris could make. Blank Applications were sent to Fogg and to Maintenance Dredging, Inc. to be filled out and submitted. During the early part of November of 1993, Plaintiffs were desperate and in need of a policy immediately to satisfy the requirement of its contract with the Corps of Engineers that it be an additional insured. Polaris demanded submission of both completed applications and current surveys. Neither applications or surveys were submitted except for those Polaris has provided to Plaintiffs herein. Binders preceding issuance of Policies were provided in all cases to Plaintiffs. Polaris providing copies or these binders was the most reasonable response in compliance with this court's order. These binders show the nature of coverage requested by Plaintiffs and precede issuance of the policies. are the most intelligent performance refused to follow the direction of this court to meet and confer so that these matters would be resolved. Instead they left Polaris counsel alone at the courthouse. Polaris counsel told them Plaintiff did not submit applications for each policy but did get binders thereon and that they would be given binders in addition to the applications as evidence of what the parties intended the Policies cover. the intent of the parties and

e. Plaintiffs at all times herein had available to them a duplicate file of the communications between Fogg and Polaris and the communications with Polaris and Plaintiff including coverage and premium quotation letters, transmittal letters. applications, binders and Policies.

Therefor: sanctions by way of Motion to Strike Pleadings, and Adverse Presumption should not lie in this case.

FACTS

I

1. No exhibits were served upon Polaris herein by Plaintiffs together with their Joint Motion.

2. On October 4. 1994, Mr. Weigand had brought to the court's attention counsel for Polaris' failure to identify the writing on the Declarations Page upon which Polaris denied coverage.

3. Mr. Weigand Presented the document to counsel for Polaris who circled two lines in the court's presence in a few seconds. See Exhibit "A' hereto. This method resolved the issue immediately.

4. With this in mind the court ordered the attorneys of the parties to go to the office of Plaintiffs' opposing counsel, one or-the other so as to identify for them the applications provided by Polaris in the files submitted to them by Polaris. On leaving the courthouse counsel for Polaris inquired of both counsel who's office they should go to in order to resolve the issue. Mr.
Weigand replied that he did not want to do that but that Counsel for Polaris send him copies of the applications instead. Counsel for Polaris objected saying that he was concerned that plaintiffs would only object again that Polaris had once again failed and refused to comply and that this production appeared to be Polaris' last chance to show compliance to this court. Counsel for Polaris also advised Plaintiffs' counsel that he would also send them binders. He announced that Plaintiffs did not submit applications for every policy but the binders issued in advance of the policy showed the coverage that the policy

should have. That this was the best Polaris could do in the absence of applications. Counsel for Plaintiffs walked away and counsel for Polaris who was left to follow their alternative demand that he provide copies of the applications rather than to identify in the files what they had that constituted the applications.

Both counsel had access to the Maintenance Dredging "mirror file' and Fogg's 'mirror file' and knew or had reason to know that the applications did not exist. ("Mirror file" a file reflecting each and every document in another file)

RESOLUTION OF POLARIS LETTERS OF OCTOBER 1993 TO MAINTENANCE DREDGING

5. At said hearing of October 4, 1996, counsel for Third Party Plaintiffs brought a letter to the court's attention that referred to an earlier quote of October 6, 1993. The first page of said letter was dated October 18, 1996, the second page was dated October 28, 1996. Counsel for Polaris had not been given notice prior to the hearing that said letter would be presented at the hearing. Said letter and motion had been telefaxed to his office on October 3, 1996 after he had left for New Orleans.

6. Counsel for Polaris suggested that the date on the second page was a typographical error because the 1, is next to the 2 on the computer keyboard. See Exhibit B. This explanation was not well regarded.

7. On October 9, 1996 when Counsel for Polaris spoke to Counsel for Third Party Plaintiffs Mr. Hebert advised that he had resolved the matter having found both the Letter of October 18. 1993 and October 28, 1993. It appeared somehow, that perhaps during copying. of same for production that the second page of one had inadvertently been attached to the other and vice - versa. He announced that he still had not found the letter dated October 6, 1993 and asked that it be produced. Counsel for Polaris had already sent an Urgent written order to the Office Manager of Polaris that she have all the applications and the binders copied and sent by-messenger

to him. Counsel for Polaris was advised that the insured Plaintiffs, as many other insureds, had not always complied with request for an application and that issuance of the binder most often preceded receipt of the application. Once the binder is received there is no pressure to send the application. Following the presentation of the binder and on receipt of payment according to the terms of the binder the policies were issued and were delivered to the insured. Once the insured has the binder and the policy there is absolutely no need to submit an application since the insured has everything it wants despite requests by the insurer for the application.

ARGUMENT

8. The communications of Polaris, Maintenance Dredging and Fogg attached hereto as Exhibit C reflect the manner in which the insured secured a policy of marine insurance without total compliance in sending a completed application or survey. The apparently irregular appearance of a file without an application is thus explained. It is the insured's burden to prove the existence of the policy and the coverage. The insured produced no letter of transmittal, nor FAX log, nor FAX, nor FAX Cover Sheet referring to any application submittal to Polaris nor to Fogg in its response to Polaris demand for production. Plaintiffs' own files should contain a copy of such application. Even Mr. Fogg. the insured's own agent, could not move plaintiff to comply with these requests. See Exhibit C letters together with FAX Cover Sheets requesting the application be filled out and submitted. The 'Fogg Documents" in Exhibit "C" were produced by Third Party Plaintiffs in response to Polaris demand for Production of documents and are thus authenticated. The letters from Polaris to the others come from the Polaris files and are thus authenticated.

9. This insured should not benefit by its failure or refusal to submit Polaris requests for the applications. The only purpose of the present demand by the insured for these documents, when it knows very well that they don' t exist or

that they do not support their position is to move this court for an Adverse Presumption ruling that these documents would show that Polaris had agreed to provide crew insurance (coverage sought herein). Indeed, the filled in applications, if ever created, originated with the insured and not the insurer. The evidence shows (see Fogg FAX to Third Party Plaintiffs, Exhibit I'D") that the insurer sent a form for the insured to fill in. Mr. Fogg sent said form to Mr. Smith of Maintenance Dredging, Inc. It is the responsibility of the insured to produce the documents. the applications, that it had originated. Note that the FAX Cover sheet used by Mr. Fogg reveals that it was sent to Smith on 11/09/93, that Fogg followed up on 11/18/93 and there is a note dated 11/22/93 11/22/96 (Gladys) Gladys, to have Glenn complete, sign and return. Note that in Exhibit IC" the Polaris letter of 11/18/93 sends the policies to Plaintiffs before Smith provides the application. Thus the application is on no value in determining the coverage requested even if it is sent in late because Smith on behalf of Plaintiff accepted the binder and the policy before he even sent an application. It is apparent that Plaintiffs are misleading this court with full knowledge that the relevant applications do not exist and that Polaris had in good faith, fully and completely as possible, complied with the order of this Honorable Court.

10. An adverse presumption is in the nature of an Equitable Remedy that should be limited by Equitable Principles and Doctrines. Axiomatic in equity are the doctrines that; "One who seeks equity must have done equity" and that "One must not come before the court of equity with unclean hands seeking relief". As applied; a party shall not receive an equitable benefit as a result of his neglectful or wrongful deed or that of his agents. It is inequitable that this court allow Plaintiffs to benefit from their negligent or willful, wrongful acts.

11. Plaintiffs' misleading the defendant with the alternative performance of once again attempting production and on their refusal to follow the course set by the court (to meet and confer) , to have Polaris counsel identify the documents and to

refuse to examine the documents together is also grounds for refusal of the equitable remedy now sought by plaintiffs herein.
12. Plaintiffs, having access to the mirror image files of Plaintiffs and Mr. Keith Fogg, either have a copy of the documents they demand and knew what the letter of October 6. 1993 said or knew that it did not exist. Plaintiffs behavior was intended to maneuver plaintiff into a position whereby once again they could complain to this court that Polaris continues to refuse to produce and is still 'playing the shell game" in order to persuade this court to rule on favorably on the motions to strike already before this court to strike Polaris pleading and render judgment instantly rather that consider the instant motion for an adverse ruling to which Polaris responds herein. This motion places before this court a report that Polaris continues contempt of this court.

CONCLUSION

11. Polaris, herein, has made every attempt to comply with the order of this court. If Polaris cannot provide the letter of October .6, 1996 it may be barred from introducing it as evidence that there was no coverage intended. If, as Plaintiffs claim, said letter actually provided or agreed to provide crew coverage Plaintiffs are estopped by the same token because, to effect proof of their position the letter must have been received by plaintiff and plaintiff's agent and relied upon by Maintenance et al. if Plaintiff cannot produce the letter of October 6. 1993 Plaintiff cannot introduce testimony of its contents because the letter itself is the best evidence. (See best evidence rule.)

12. Polaris is not in contempt of this court's order of October 4, 1996 in that it has done-all that it could to obey same.

Dated: October 12, 1996

S/ Joseph Gimbrone,
Atorney for Defendant
Polaris Insurance Copany, Ltd.
401 West "A" Street , Ste. 1300
San Diego, Ca. 92101
Phone:(619) 234-3386 8
FAX: (619) 234-9950

S/ Overton T. Harrington, Esq. Attorney at Law
Local Counsel for Polaris Insurance Company, Ltd. 301 Huey P. Long Avenue Gretna, Louisiana, 70053 for Defendant, Polaris Insurance Company, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record this October 10, 1996, by Federal Express mail.

TO: CHARLES J. BRUNET
through HIS ATTORNEY
RICHARD A. WEIGAND
427 Gavier Street, Ground Floor
New Orleans, LA 7031

TO: MAGNOLIA HOLDINGS, INC. et al.
through THEIR ATTORNEY
CARL J. HEBERT
EVANS & CO.
220 CAMP STREET
NEW ORLEANS, LA. 70130

s/ Joseph L.Gimbrone,Esq

POLARIS INSURANCE COMPANY, LIMITED

November 8, 1993

Fogg Insurance Agency
Keith Fogg
64340 Fogg Lane
Pearl River, LA
FAX: 504-863-2555

Regarding: Binder for Fleet Insurance Coverage

Binder #93110545
-Dredge "Georgia"
-Tender Barge "Whithall"
-Tender Barge "Carol Ann"
-Crain Barge "RAC107"

Binder #93110546
Quarter Barge "MGA #1"
Quarter Barge "MGA #2"
Quarter Barge "MGA #3"

Dear Mr. Fogg:

We are pleased to forward to your attention binders for coverage on the above listed vessels as fully delineated below:

Binder #93110545	P&I	Hull	Ded	Coics
Dredge "Georgia"	1,000,000	$ 600,000	$25,000	80%
Tender Barge "Whithall"	1,000,000	$ 50,000	$10,000	80%
Tender Barge "Carol Ann"	1,000,000	$ 50,000	$10,000	80%
Crain Barge "RAC107"	1,000,000	$ 50,000	$10,000	80%

P&I Deductible is $5,000 per claim

We confirm that premium is calculated as follows:

	Hull	P&I
Dredge "Georgia"	$17,800	$ 15,000
Tender Barge "Whithall"	$ 2,090	$ 7,500
Tender Barge "Carol Ann"	$ 2,090	$ 7,500
Crain Barge "RAC107"	$ 3,880	$ 6,000
Premium per risk	$25,780	$ 36,000

Total Premium:	$61,780.00
Down Payment:	$18,534.00
Financed:	$43,246.00

P.O. Box 5481-1000
San Jose, Costa Rica
Tel: 506-22-04-84
Fax: 506-23-48-04
USA Toll Free: 800-382-8324

POLARIS INSURANCE COMPANY LIMITED

Fogg Insurance Agency
November 8, 1993

Premium is financed and will be payable each month for 11 months. Finance charge of 1.5% per month will be charged on the outstanding balance, with credit for the port risk amount from any vessel per month also provided.

Binder #93110546	P&I	Hull	Deductible
Quarter Barge "MGA #1"	1,000,000	N/A	$5,000.00
Quarter Barge "MGA #2"	1,000,000	N/A	$5,000.00
Quarter Barge "MGA #3"	1,000,000	N/A	$5,000.00

Premium is as Follows:	
Quarter Barge "MGA #1"	$ 5,000.00
Quarter Barge "MGA #1"	$ 5,000.00
Quarter Barge "MGA #1"	$ 5,000.00
Total Premium	$15,000.00
Finance Charge	$ 1,000.00
Total Due	$16,000.00

Down Payment $ 4,000.00

Regarding both binders:

Be advised that we still require our marine application signed and dated for each risk and specifically the following information per vessel: Engines ID, builder, thickness of hull, last overhaul, generator detail, registration and identification numbers, copy of survey and coast guard certificates.

Navigation per vessel: Mississippi and Mobile River - New Orleans Baton Rouge to Venice. Should Navigation differ supply in writing on FAX and revision on the policy may be required.

Minimum 25% earned premium on cancellation of policy for any reason.

Financed premium have a ten day grace period for late payment of financed premium. Failure to pay within this time will cause suspension of the coverage without further notice to the insured or agent Reinstatement of the coverage will occur on payment in full of past due amount plus submission of affidavit of no losses during the suspension period.

Premium remittance is necessary to effect the coverage, please wire transfer to our account the down payment for each policy/binder as follows:

ACORD. [redacted] BINDER

November 5, 199

THIS BINDER IS A TEMPORARY INSURANCE CONTRACT. SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM.

Fogg Insurance Agency, Inc.
64340 Fogg Lane
Pearl River LA 70452
TEL: 504-863-6200
FAX: 504-863-2555

Polaris Insurance Co., Ltd. 93110545

Novem 6 1993 12:01 — Decem 5 1993

River Products, Inc.
100 Florida Avenue
River Ridge LA 701231
FAX: 504-737-1660

Fleet Coverage:
Dredge Georgia; Tender Barge Carol Ann; Tender Barge Whithall; Grain Barge RAC107;
Navigation: Mississippi and Mobile River

	Fleet coverage vessels see Attachment #1 Novesber 6, 1993 - Novesber 4, 1994	See Attachment #1	
X Occurrence General Liability	Fleet coverage vessels see Attachment #1 Novesbe 6, 1993 - Novesber 4, 1994	General Aggregate	1 Million
		Products - Comp/Op Agg	0.00
		Personal & Adv Injury	0.00
		Each Occurrence	0.00
X Deductible $5,000/claim		Fire Damage (Any one fire)	0.00
		Med Expense (Any one person)	0.00
Any Auto	N/A	Combined Single Limit	
All Owned Autos		Bodily Injury (Per person)	
Scheduled Autos		Bodily Injury (Per accident)	
Hired Autos		Property Damage	
Non-owned Autos		Medical Payments	
Garage Liability		Personal Injury Prot	
		Uninsured Motorist	
Collision	N/A	Actual Cash Value	
Other than Coll.		Stated Amount	
		Other	
Umbrella Form	N/A	Each Occurrence	
Other than Umbrella Form		Aggregate	
		Self-Insured Retention	
		Statutory Limits	
Employer's Liability		Each Accident	
		Disease-Policy Limit	
		Disease-Each Employee	

Coverage pending premium payment.

Premium: Georgia Full Risk $32,800
Carol Ann $ 9,590
Whithall $ 9,800

RAC107 $ 9,800.00
Down Pay $18,394.00
Financed $43,216.00

NOTE: "Coverage is pending affidavit as to no losses during the retro active insured period, and on receipt of survey and application".

November 8, 1993
Leticia More C. - Office Manager

BEST AVAILA

ACORD. [redacted] BINDER

November 5 1993

THIS BINDER IS A TEMPORARY INSURANCE CONTRACT. SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM.

Fogg Insurance Agency, Inc.
64340 Fogg Lane
Pearl River, LA 70452
TEL: 504-863-6200
FAX: 504-863-2555

Polaris Insurance Co., Ltd. 93110546

Nov 6, 1993 12:00 X AM PM Dec 5 1993 X NOON

Magnolia Holdings, Inc.
100 Florida Avenue
River Ridge LA 701231
FAX: 504-737-1660

Fleet Coverage: For navigation Mississippi and Mobile Rivers for the following: MAG #1, MAG #2, MAG #3. Quarter Barges.

TYPE OF INSURANCE			AMOUNT	DEDUCTIBLE	DENIAL
X BASIC BROAD SPEC.			N/A	N/A	N/A
X COMMERCIAL GENERAL LIABILITY CLAIMS MADE OCCUR	Fleet coverage Quarters Barges MAG #1, MAG #2, MAG #3. November 5 1993 - November 4, 1994	GENERAL AGGREGATE	$		1 Million
		PRODUCTS - COMP/OP AGG.	$		0.00
OWNER'S & CONTRACTOR'S PROT.		PERSONAL & ADV. INJURY	$		0.00
X Deductible $5,000	claim	EACH OCCURRENCE	$		0.00
	RETRO DATE FOR CLAIMS MADE	FIRE DAMAGE (Any one fire)	$		0.00
		MED. EXPENSE (Any one person)	$		0.00
AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS GARAGE LIABILITY	N/A	COMBINED SINGLE LIMIT	$		
		BODILY INJURY (Per person)	$		
		BODILY INJURY (Per accident)	$		
		PROPERTY DAMAGE	$		
		MEDICAL PAYMENTS	$		
		PERSONAL INJURY PROT.	$		
		UNINSURED MOTORIST	$		
			$		
AUTO PHYSICAL DAMAGE DEDUCTIBLE COLLISION OTHER THAN COLL	ALL VEHICLES N/A	SCHEDULED VEHICLES	ACTUAL CASH VALUE STATED AMOUNT OTHER	$		
EXCESS LIABILITY UMBRELLA FORM OTHER THAN UMBRELLA FORM	N/A RETRO DATE FOR CLAIMS MADE		EACH OCCURRENCE AGGREGATE SELF-INSURED RETENTION	$		
WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY	"All crew, employees, workers and casual laborers on board must be covered by workers compensation liability insurance to the minimum of the statutory rates for the state of location of the barges at all times".		STATUTORY LIMITS EACH ACCIDENT DISEASE-POLICY LIMIT DISEASE-EACH EMPLOYEE	$		

Premium Annual: MAG#1 $5,000.00
MAG#2 $5,000.00
MAG#3 $5,000.00

Down payment Due $4,000.00

Note: "Coverage is pending affidavit as to no losses during the retro active insured period, and on receipt of survey and application".

MORTGAGEE	ADDITIONAL INSURED
LOSS PAYEE	

Ana Lucrecia Mora C. November 5, 1993
Ana Lucrecia Mora C. - Office Manager

POLARIS INSURANCE CO., LTD. [illegible]

LABLE COPY

Fogg Insurance Agency, Inc.
64340 Fogg Lane - Pearl River, LA 70452
Office (504) 863-6200 - FAX (504) 863-2555

FAX TO: Glen
River Products
RE: Application

FROM: Ron
# of Pages 3
(Including Cover)

COMMENTS:

See App to be completed on each vessell.
Please complete, sign and return ASAP

11/22/93 (Gladys) to have Glen complete & return

If you did not receive all of the pages or you are unable to read, please notify us ASAP.

DATE: 11/09/93 OPERATOR: RB
TIME: 11:25 AM RECEIVED:

Follow-up 11/18/93

MARINE INSURANCE APPLICATION

This application must be completed and signed, returned by FAX to 011-506-23-48-64, and also mailed to PO BOX 5491-1000, San Jose Costa Rica C.A.

Name of Owner: _____ ☐ Corporation ☐ Individual

Address: _____

Telephone: _____ FAX: _____

Mortgage Holder: _____ Mortgage Amount: _____

Address: _____

Name of Vessel: _____ Country of Registry: _____

Registry #: _____ Document #: _____ Hull ID #: _____

[illegible]

Built By: _____ Date Built: _____ Where: _____

Construction: ☐ Steel ☐ Fiberglass ☐ wood ☐ Other (specify): _____

Type of Vessel (must specify): _____

Navigation (specify waters): _____

LOA: _____ LWL: _____ Beam: _____ Draft: _____

Gross Tons: _____ Net Tons: _____ IOPP #: _____ DWT: _____

Number Hatches: _____ No. of Cranes: _____ No. of Decks: _____

Date Purchased: _____ Last Survey Date: _____ _____ (Submit Copy)

[illegible]

☐ Freighter (specify cargo): _____ ☐ Bulk ☐ Container ☐ Refrigerated ☐ Ro-Ro ☐ Landing Craft

☐ Fishing (specify): _____ ☐ Bare Boat Charter ☐ Day Charter (specify): _____

☐ Long Term Charter (specify): _____ ☐ Commercial ☐ Other ☐ Tugboat ☐ Push Boat

☐ Scrap Boat ☐ Dredge ☐ Barge (specify): _____ ☐ Dive Boat (specify): _____ ☐ Research

NOTE: Private pleasure, diving, parasailing and boat racing are specifically excluded unless requested on a separate page, approved in writing by the Company, and then listed in the policy by endorsement.

Guests/Passengers: _____ Paying passengers? ☐ Yes ☐ No

NOTE: All passengers must sign a waiver of liability on boarding.

Activity of Guests/Passengers: _____

[illegible]

Cost To Owner: $_____ Survey Value: $_____ Survey Date: _____

Hull Insurance Requested: $_____ Deductible: $ _____

Liability Insurance Requested: $_____ Deductible: $ _____

Crew Coverage Requested: $_____ # Covered Crew: _____ (must submit listing of all crew & licenses)

Towers Liability Requested: $_____ Excess Liability Requested: $_____

Cargo Insurance Requested: ☐ Yes (separate application required) ☐ No

Port Risk only?: ☐ Yes ☐ No Seasonal: _____

Trip Risk?: ☐ Yes ☐ No Dates Needed: [illegible] Specific Navigation: [illegible]

ENGINE/GENERATOR

Engine Make: _____ Diesel? ☐ Yes ☐ No HP: _____ Max. Speed: _____

Serial #: _____ Year Built: _____ Year Rebuilt: _____

Generator Make: _____ Year: _____ KW: _____ Fuel: _____

CO2 System Make: _____ Year: _____ Date Certified: _____

SAFETY EQUIPMENT

Pumps: _____ Date Certified: _____

Fire Extinguishers: _____ Date Certified: _____

Life Vests: _____ Date Certified: _____

Life Rafts: _____ Date Certified: _____

Dinghy: _____ Date Certified: _____ Serial No.: _____

Outboard Make: _____ HP: _____ Year: _____ Value: $ _____

Insure Dinghy? ☐ Yes ☐ No Value to Insure: $_____

ELECTRONICS

VHF: _____ Year: _____ RADAR: _____ Year: _____

SSB: _____ Year: _____ LORAN: _____ Year: _____

RDF: _____ Year: _____ OMEGA: _____ Year: _____

SATNAV: _____ Year: _____ AUTO P.: _____ Year: _____

NOTE: Stereos, VCRs, TVs and microwaves are not covered.

GENERAL

Owner Experience: # years _____ Licenses: _____ Losses: _____

Types of vessels: _____ USCG license: _____ Tonnage: _____

Issue Date: _____ Issue #: _____ (If losses, attach separate sheet to describe in detail.)

Captain Experience: # years _____ Licenses: _____ Losses: _____

Types of vessels: _____ USCG license: _____ Tonnage: _____

Issue Date: _____ Issue #: _____ (If losses, attach separate sheet to describe in detail.)

Number of Crew (Excluding Captain): _____

SPECIFICATIONS

Installment Plan to Pay for Premium? ☐ Yes ☐ No

Other Special Extensions?: ☐ Yes (attach separate sheet) ☐ No

Current Insurance in Force?: ☐ Yes ☐ No Name of Company: _____

Date Policy Expires: _____

Insured Value: $_____ Premium: $_____ Other Insurance Coverage: $ _____

Insured P&I: $_____ Premium: $_____

To the best of my knowledge and belief, the information set forth in this application is correct and true. I understand that I am in no way bound to accept any quotation which the Company may make and that the Company is not bound to accept the risk. I understand that the insurance offered is offshore to the United States for commercial marine risks and has been solicited by me to the Company directly or through an agent who has explained this to me.

Date: _____ Signature: _____

Agent: _____

1023 1995 1212

POLARIS INSURANCE COMPANY, LIMITED

November 18, 1994

Magnolia Holdings, Inc.
100 Florida Avenue
River Ridge, LA 70123
FAX: 504-737-1660

and copy to:
Fogg Insurance Agency, Inc.
64340 Fogg Lane
Pearl River, La 70452
FAX: 504-863-2555
TEL: 504-863-6200

SENT COURIER

Regarding: Policy of Insurance - Magnolia Holdings, Inc.
Policy #D-9300-94110557 (fleet)

Dear Messrs,

Enclosed find original of policy of marine insurance for MAGNOLIA HOLDINGS, INC. for the Quarter Barges identified as MAG #1, MAG #2 and MAG #3.

Schedule of Premium:	P&I
Quarter Barge "MAG #1"	$ 5,000.00
Quarter Barge "MAG #2"	$ 5,000.00
Quarter Barge "MAG #3"	$ 5,000.00
Total Premium	$15,000.00
Down Payment:	$ 5,000.00
Financed:	$10,000.00
Plus Interest flat	$ 964.01
Net to pay over financed term	$15,964.01

We will invoice you for payments on the financed premium.

Note that we still require the following: Engines ID, builder, thickness of hull, last overhaul, generator detail, registration and identification numbers, copy of survey and coast guard certificates, as well as detail navigational limits. This information must be received or coverage may be in jeopardy.

P.O. Box 5481-1000
San Jose, Costa Rica
Tel: 506-22-04-84
Fax: 506-23-48-04
USA Toll Free: 800-382-8324

POLARIS INSURANCE COMPANY LIMITED

If you have any questions regarding the premium or the policy, please fax to my attention.

Sincerely,

Ana Lucrecia Mora C.
Office Manager

Enclosure: Original policy of Insurance
Duplicate Original (Fogg Agency)

POLARIS INSURANCE COMPANY, LIMITED

November 8, 1993

Fogg Insurance Agency
Keith Fogg
64340 Fogg Lane
Pearl River, LA
FAX: 504-863-2555

Regarding: Binder for Fleet Insurance Coverage

Binder #93110545
-Dredge "Georgia"
-Tender Barge "Whithall"
-Tender Barge "Carol Ann"
-Crain Barge "RAC107"

Binder #93110546
Quarter Barge "MGA #1"
Quarter Barge "MGA #2"
Quarter Barge "MGA #3"

Dear Mr. Fogg:

We are pleased to forward to your attention binders for coverage on the above listed vessels as fully delineated below:

Binder #93110545	P&I	Hull	Ded	Coics
Dredge "Georgia"	1,000,000	$ 600,000	$25,000	80%
Tender Barge "Whithall"	1,000,000	$ 50,000	$10,000	80%
Tender Barge "Carol Ann"	1,000,000	$ 50,000	$10,000	80%
Crain Barge "RAC107"	1,000,000	$ 50,000	$10,000	80%

P&I Deductible is $5,000 per claim

We confirm that premium is calculated as follows:

	Hull	P&I
Dredge "Georgia"	$17,800	$ 15,000
Tender Barge "Whithall"	$ 2,090	$ 7,500
Tender Barge "Carol Ann"	$ 2,090	$ 7,500
Crain Barge "RAC107"	$ 3,880	$ 6,000
Premium per risk	$25,780	$ 36,000

Total Premium:	$61,780.00
Down Payment:	$18,534.00
Financed:	$43,246.00

P.O. Box 5481-1000
San Jose, Costa Rica
Tel: 506-22-04-84
Fax: 506-23-48-04
USA Toll Free: 800-382-8324

APPENDIX H
JUDGMENT AND REASONS ON WHICH THE COURT BASED ITS ORDER THAT POLARIS POST A BOND FOR SECURITY

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: _____ DEPUTY CLERK

JUDGMENT AND REASONS

This matter came for hearing on October 29, 1996 on Joint Motion of Plaintiff, M & L Dredging and Magnolia Quarterboats to Strike the Pleading Filed by Polaris Insurance Co., Ltd. for Failure to Comply with LA.R.S. 22:1255.

PRESENT:

Richard A. Weigand, attorney for plaintiff;

Carl J. Hebert, attorney for Magnolia
Quarterboats and
Maintenance Dredging;

Joseph L. Gimbrone and Tom Harrington,
attorneys for Polaris
Insurance Co.;

IT IS ORDERED, ADJUDGED AND DECREED that the Joint Motion to Strike the Pleadings Filed by Polaris is GRANTED.

This Court now orders all pleadings previously filed by Polaris Insurance Co., Ltd. will now be stricken for failure to post a bond pursuant to La.R.S. 22:1255.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Polaris Insurance Co., Ltd. is to pay all cost of these proceedings.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisana, this 29 day of Otober 1996.

Jo Ellen Grant
JUDGE

APPENDIX I

JUDGMENT ON MOTION TO STRIKE PLEADINGS AND FOR SANCTIONS

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL
FILED: _____ DEPUTY CLERK _____

JUDGMENT

This matter came for hearing on October 28, 1996, on the following motions:

Joint Motion to Strike Pleadings Filed by Polaris Insurance Company, Ltd. for Failure to Comply With LA-Rev. Stat. Sect. 22:1255 or to Require Posting of Bond Pursuant to LA-Rev.
Stat. Sect. 22:1255 (filed by Charles Brunet, Magnolia Holdings, Inc. and Maintenance Dredging, Inc.); and

Joint Motion for Sanctions for Failure to Respond Properly to Requests for Production of Documents in Compliance with the Court's Order (filed by Charles Brunet, Magnolia Holdings, Inc. and Maintenance Dredging, Inc.).

PRESENT:

Richard A. Weigand, counsel for plaintiff, Charles Brunet

Carl J. Hebert, counsel for original defendants/third party plaintiffs, Magnolia Holdings, Inc. and Maintenance Dredging, Inc.

Joseph Giambrone (appearing by telephone), counsel for defendant, Polaris Insurance Company

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED that the Joint Motion for Sanctions for Failure to Respond Properly to Requests for Production of Documents in Compliance with the Court's Order filed herein by Charles J. Brunet, Magnolia Holdings, Inc. and Maintenance Dredging, Inc. is GRANTED.

With respect to the failure of defendant, Polaris Insurance Company, Ltd., to produce the insurance quote of October 6, 1993 in contravention of discovery requests and Court Order gives rise to an adverse presumption that the October 6, 1993 letter would have contained information adverse to the position of Polaris Insurance Company, Ltd. that it did not quote for crew coverage to be provided to Magnolia Holdings, Inc. and MaintenanceDredging, Inc. Further, the failure of Polaris Insurance Company, Ltd. to comply with the Court Order regarding the production and identification of the applications for insurance of Magnolia Holdings, Inc. and Maintenance Dredging, Inc. precludes Polaris Insurance Company, Ltd. from introducing into evidence any information regarding applications for insurance other than those which Polaris Insurance Company, Ltd. had earlier produced, and further gives rise to an adverse presumption against Polaris Insurance Company, Ltd. that the applications which were produced

indicate that crew coverage was requested by Magnolia Holdings, Inc. and Maintenance Dredging, Inc.

IT IS ORDERED, ADJUDGED AND DECREED that the Joint Motion, to Strike Pleadings Filed by Polaris Insurance Company, Ltd. for Failure to Comply With LA-Rev. Stat. Sect. 22:1255 or to Require Posting of Bond Pursuant to LA-Rev. Stat. Sect. 22:1255, filed herein by Charles J. Brunet, Magnolia Holdings, Inc. and Maintenance Dredging, Inc., be GRANTED.

Polaris Insurance Company, Ltd. is found in Contempt of Court for its failure to appear and produce documents at the hearing of October 25, 1996, pursuant to not only the Order of this Court dated October 21, 1996, but as well, pursuant to the subpoena duces tecum issued by the Clerk of Court dated October 21, 1996, and is hereby fined in the amount of $1,500.00 to be paid to plaintiff, Charles J. Brunet, and defendants/third party plaintiffs, Magnolia Holdings, Inc. and maintenance Dredging, Inc., and is Ordered to pay the fine and produce the documents subpoenaed at the office of Richard A. Weigand, 427 Gravier Street, New Orleans, Louisiana, by Monday, October 28, 1996, at 12:00 noon CST. Furthermore, Polaris Insurance Company, Ltd., is Ordered to post a bond in this matter with the Clerk of Court, 24th Judicial District Court, Parish of Jefferson, State of Louisiana, in the amount of FIVE HUNDRED FIFTY THOUSAND AND NO ($550,000.00) DOLLARS, and which bond is to be obtained from an A-Best rated bonding company, or other good and- sufficient surety. If Polaris Insurance Company, Ltd. fails to post the bond by 12:00 noon CST on Monday, October 28, 1996, the entirety of the pleadings filed herein by Polaris Insurance Company, Ltd. shall be struck from the record and the Clerk of Court shall enter a Preliminary Default against Polaris Insurance Company, Ltd.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs associated with these Motions are assessed against Polaris Insurance Company, Ltd.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana, this the 28th day of October, 1996, at 8:30 o'clock a.m. CST.

Jo Ellen Grant
JUDGE

CLERK

I HEREBY CERTIFY THAT ALL COSTS REQUIRED IN THIS MATTER HAVE BEEN PAID

APPENDIX J

NOVEMBER 5th ORDER RE: JOINT ORAL MOTION FOR SANCTIONS

24TH JUDICIAL DISTRICT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER 478-181 DIVISION: I

CHARLES J. BRUNET

VERSUS

MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: 11-4-96 DEPUTY CLERK_____

This matter came on for hearing on October 29 1996, on the following motion:

Oral Motion for Sanctions for the Failure of Polaris Insurance Company, Ltd. to comply with the Court Order of October 28, 1.996,

Richard A. Weigand ,counsel for plaintiff, Charles Brunet

Carl J. Hebert, Counsel for original defendants/ third party plaintiffs Magnolia Holdings, Inc. and Maintenance Dredging, Inc.

Joseph Giambrone, co-counsel for defendant, Polaris Insurance Company, Ltd.

Overton T. Harrington, co-counsel for defendant, Polaris Insurance Company, Ltd.

On Joint Oral Motion for Sanctions for the failure of Polaris Insurance Company, Ltd. to Comply with the Court Order of October 28, 1996, of Charles J. Brunet, Maintenance Dredging, inc. and Magnolia Holdings, Inc., and upon a showing that Polaris Insurance Company, Ltd. failed to pay, as Ordered by the Judgment of this Court dated October 28, 1996, the fine in the amount of $1,500.00 to Charles J. Brunet, Maintenance Dredging, Inc. and Magnolia Holdings, Inc., and to produce the documents Ordered to be produced in said Judgment at the Office of Richard A. Weigand, 427 Gravier Street, New Orleans, Louisiana:

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED that the Joint Motion for Sanctions of Charles J. Brunet, Maintenance Dredging, Inc. and Magnolia Holdings, Inc. is GRANTED.

Polaris Insurance Company, Ltd. is hereby sanctioned an additional S2,500.00 this date for its failure to pay the fine and produce documents when ordered by this Court . Further, if Polaris Insurance Company, Ltd. continues in contempt in any respect by continuing to fail to pay all fines now due or by continuing to fail to produce the documents Ordered by 5:00 p.m., CST, Thursday, October 31, 1996, they are additionally fined $3,500.00; if Polaris continues in contempt in any respect of this Court's Orders by 9:00 a.m. CST on Monday, November 4, 1996, Polaris shall be fined an additional $5,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the aforementioned contempt fines as due and payable are to be paid into the Registry of the Court for the benefit of Movers, Charles J. Brunet, Maintenance Dredging, Inc. and Magnolia Holdings, Inc.

JUDGMENT

This matter came for hearing on October 29, 19-96, on the following motion:

READ, RENDERED AND SIGNED at Gretna, Louisiana, this the 4th day of November 1996, at 3:30 p.m., CST.

S/ Jo Ellen Grant
JUDGE

Oct. 26, 1996
I certify all costs
in this matter have
been paid

Deputy Clerk/

APPENDIX K

ORDER ON JUDGMENT DEBTOR RULE

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL

FILED: _____ DEPUTY CLERK _____

ORDER

Considering the foregoing Joint Judgment Debtor Rule:

Let POLARIS INSURANCE COMPANY, LTD. be duly ordered to appear in open court on the 15TH Of November 1996 at 9:00 a.m. o'clock to be examined as a judgment debtor under the provisions of the Louisiana Code of Civil Procedure Article 2451, et seq.

Let POLARIS INSURANCE COMPANY, LTD. be further notified and summoned to produce at the above time the books, papers and documents described hereinabove in the Judgment Debtor Rule.

SIGNED IN Gretna, Louisiana this the 6 day of November, 1996.

Jo Ellen Grant
JUDGE

PLEASE SERVE:

POLARIS INSURANCE COMPANY, LTD. through its counsel of record, Overton T. Harrington, Esquire 301 Huey P. Long Avenue
Gretna, LA 70053

APPENDIX L

ORDER TO APPEAR AS WITNESS

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL
FILED: _____ DEPUTY CLERK _____

ORDER

Considering the foregoing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a Representative of Polaris Insurance Company, Ltd. appear in open Court and testify on Friday, October. 25, 1996, at 11:00 a.m., at the hearing on the Motion to Strike Pleadings Filed by Polaris Insurance-Company, Ltd. for Failure to Company With LA-Rev. Stat. Sect. 22:1255 or to Require Posting of Bond Pursuant to LA-Rev. Stat. Sect. 22:1255.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Representative of Polaris Insurance Company, Ltd., produce the following documents at the aforementioned hearing:

1. The original corporate license issued to Polaris Insurance Company, Ltd., by the British Virgin Isles or any other government agency controlling corporations in Costa Rica;

2. The original license of Polaris Issuance Company, Ltd. to issue insurance policies issued by the British Virgin Isles or any other government agency controlling corporations in Costa Rica.

3. Copies of each and every policy that Polaris has ever written in the State of Louisiana.

4. Copies of each and every policy that Polaris has ever written in any State in the United States other than in the State of Louisiana;

5. The original of any document issued to Polaris Insurance Company, Ltd. authorizing Polaris Insurance Company, Ltd. to write insurance coverage in any of the 50 states in the United States.

GRETNA, Louisiana, this the 2st day of October, 1996.

Jo Ellen Grant
JUDGE

PLEASE SERVE:

POLARIS INSURANCE COMPANY, LTD. through its counsel of record, Overton T. Harrington, Esquire,
301 Huey P. Long Avenue
Gretna, LA 70053

APPENDIX M

NO PRELIMINARY DEFAULT ORDER IN RECORD

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA
NUMBER: 478-181 DIVISION: "I"

CHARLES J. BRUNET
VERSUS
MAGNOLIA QUARTERBOATS, INC., ET AL
FILED: _____ DEPUTY CLERK

_____

THERE IS NO SPECIFIC ORDER ON PRELIMINARY DEFAULT IN THE RECORD AS PROVIDED TO POLARIS' COUNSEL BY THE CLERK OF THE COURT ON REQUEST FOR THE RECORD

THE CLERK IS ORDERED TO ENTER PRELIMINARY DEFAULT IN THE OCTOBER 29, 1998 RECORD IF POLARIS DOES NOT POST THE BOND ORDERED BY THE COURT

Dated: August, 21, 1998 S/_____
Joseph L. Gimbrone, Esq

APPENDIX N

LA C.C.P. Art. 1 Souces of Law

The sources of law are legislation and custom
Acts 1987, No. 124, §1, eff. Jan. 1, 1988.

LA C.C.P. Art. 2. Legislation

Legislation is a solemn expression of legislative will.
Acts 1987, No. 124, §1, eff. Jan. 1, 1988.

LA C.C.P. Art. 3. Custom

Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.

Acts 1987, No. 124, § 1, eff. Jan. 1, 1988.

Art. 1313. Same; service by mail or delivery

A pleading which requires no appearance or answer, or which under an express provision of law may be served as provided in this article, may be served either by the sheriff or by:

(1) Mailing a copy thereof to the adverse party at his last known address, or to his counsel of record, this service being complete upon mailing;

(2) Delivering a copy thereof to the adverse party, or to his counsel of record; or

(3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.

When service is made by mail or delivery, the party or counsel making the service shall file in the record a certificate of the manner in which service was made.

C.C.P. § 1313. Service by mail, delivery, or facsimile

A. A pleading which requires no appearance or answer, or which under an express
of law may be served as provided in this Article, may be served either by the sheriff
by:

(1) Mailing a copy thereof to the adverse party at his last known address, or to his counsel of record, this service being complete upon mailing.

(2) Delivering a copy thereof to the adverse party, or to his counsel of record.

(3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.

(4) Facsimile transmission of a copy thereof to the adverse party, at his number designated facsimile transmission, or to his counsel of record, at his number designated for facsimile , this service being complete upon receipt of the transmission.

B. When service is made by mail, delivery, or facsimile transmission, the party or counsel
the service shall file in the record a certificate of the manner in which service was

by Acts 1997, No. 249, § 1.

La. CONSTITUTION
ARTICLE 5(C)

Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges

For complete text of Const. Art. 5, § 5, see page 573.

(C) Scope of Review. Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.

La. R.S. 13:4611

§ 4611. Punishment for contempt of court

Except as otherwise provided for by law:

(1) The supreme court, the courts of appeal, the district courts, family courts, juvenile courts and the city courts may punish a person adjudged guilty of a contempt of court therein, as follows:

(a) For a direct contempt of court committed by an attorney at law, by a fine of not more than one hundred dollars, or by imprisonment for not more than twenty-four hours, or both; and, for any subsequent contempt of the same court by the same offender, by a fine of not more than two hundred dollars, or by imprisonment for not more than ten days, or both;

(b) For disobeying or resisting a lawful restraining order, or preliminary or permanent injunction, by a fine of not more than one thousand dollars, or by imprisonment for not more than twelve months or both.

(c) For a deliberate refusal to perform an act which is yet within the power of the offender to perform, by imprisonment until he performs the act; and

(d) For any other contempt of court, including disobeying an order for the payment of child support or alimony or an order for the right of visitation, by a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both.

(2) Justices of the peace may punish a person adjudged guilty of a direct contempt of court by a fine of not more than ten dollars, or imprisonment in the parish jail for not more than twenty-four hours, or both.

Added by Acts 1960, No. 32, § 6, eff. Jan. 1, 1961. Amended by Acts 1964, No. 241,
§ 1; Acts 1972, No. 664, § 1; Acts 1985, No. 43, § 1.

LA. R. S. 22:6 REGULATORY MATTERS

R. S. 22:6

(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

PART XXVII UNAUTHORIZED INSURANCE

Section

1249. Transacting a business of insurance by unauthorized insurer defined.

1250. Insurance commissioner may institute legal proceedings against unauthorized insurer.

1251. Domestic insurer prohibited from issuing policies in state where unauthorized; commissioner's approval required.

1252. Acting as agent for unauthorized insurer prohibited.

1253. Transacting business; constitutes appointment of agent for service of process; worker's compensation claims agent.

1254. Use of courts; prohibited to unauthorized insurer.

1255. Requirements to be met before using courts.

1256. Validity of contracts illegally effectuated.

1257. Surplus line insurance from unauthorized insurers.

1258. Endorsement of contract.

1259. Surplus line insurance valid.

1260 to 1261. Repealed.

1262 Surplus lines insolvent insurers; capital and surplus requirements; deposits and bond requirements; increased amounts for taxi cabs.

1262.1. Approved unauthorized insurers; list; requirements; removal.

1263 Records of surplus line broker.

1263.1. Proof of uninsurability; affidavit.

1264. Surplus line broker's annual statement.

1265. Tax on surplus lines.

1266. Penalty for failure to file statement or remit tax.

1267. Suspension or revocation of licenses.

1268. Legal process against surplus line insurer.

1269. Exemptions.

1270. Records of insureds.
1271. Tontine funds; sales prohibited.
1272, 1273. [Blank].
1274 to 1290. [Blank].
1291 to 1300. [Blank].

La. R.S. 22:1249.

§ 1249. Transacting a business of insurance by unauthorized insurer defined

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer is defined to be transacting an insurance business in this state:

(1) The making of or proposing to make, as an insurer, an insurance contract.

(2) The solicitation, taking or receiving of any application for insurance contract.

(3) The receiving or collection of any premiums, membership fees, assessment, dues or other considerations for any insurance contract.

(5) The transaction of any matter subsequent to the execution of such a contract and arising out of it.

(6) The doing or proposing to do any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of the insurance laws of this state.

(7) The issuance of a policy or writing any line of health insurance by the insurer within five years after the insurer has ceased writing health insurance in the state.

B. This Section shall not apply to

(1) The lawful transaction of surplus line insurance.

(2) The lawful transaction of reinsurance by insurers.

(3) Transactions in this state involving a policy lawfully solicited, written,
and delivered outside of this state, covering subjects of insurance not resident located, or expressly to be performed in this state at the time of issue, and which transactions are subsequent to the issuance of the policy.

(4) Transactions in this state involving group or blanket insurance and group annuities where the master policy of such groups was lawfully issued and delivered in a state in which the company was authorized to do an insurance business.

(5) Transactions in this state involving any policy of insurance issued prior to July 31, 1968.

(6) Any life insurance company or annuity company organized and operated without profit to any private shareholder or individual, exclusively for the purpose of aiding educational or scientific institutions organized and operated without profit to any private shareholder or individual by issuing insurance and annuity contracts direct from the home office of the company and without agents or representatives in this state only to or for the benefit of such institutions, and to individuals engaged in the services of such institutions.

(7) Insurance on vessels, crafts, hulls, cargoes, marine builders risks, marine protection and indemnity or other risk including strikes and war risks commonly insured under ocean or wet marine forms of policy.

(8) Transactions involving risks located in this state where the policy or contract of insurance for such risk was principally negotiated and delivered outside this state, and was lawfully issued in a state or foreign country in which the foreign or alien insurer was authorized to do an insurance business, and where such insurer has no contact with this state except in connection with inspections or losses required by virtue of the contract or policy of insurance covering the risk located in this state, including transactions involving the operation of worker's compensation claims offices pursuant to R.S. 23:1161.1.

Added by Acts 1968, No. 52, § 1. Amended by Acts 1990, No. 885, § 1; Acts 1993, No. 663, § 2, eff. June 16, 1993.

§ 1250. Insurance commissioner may institute legal proceedings against unauthorized Insurer

Whenever the commissioner of insuran ce believes, from evidence satisfactory to him, that any person or insurer is violating or about to violate any provision of this Part or any order or requirement of the commissioner issued or promulgated pursuant to authority granted the commissioner by any provision of this Code or by law, he may bring an action in the name of the people of the State of Louisiana in the District Court for the Nineteenth Judicial District, Baton Rouge, Louisiana, against such person or insurer to enjoin such person or insurer from continuing such violation or engaging therein or doing any act in furtherance thereof. In such action an order or judgment may be entered awarding such preliminary or final injunction as is proper.

Added by Acts 1968, No. 53, § 1.

La. R.S. 22:1254 Use of courts; prohibited to unauthorized insurer

Use of courts; prohibited to unauthorized insurer

1254

§ 1254. No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this state to enforce any right, claim or demand arising out of the transaction of business in this state until such insurer shall have obtained a certificate of authority to transact insurance business in this state. Nothing in this Section shall be construed to require an unauthorized insurer to obtain a certificate of authority before instituting or filing or causing to be instituted or filed any suit, action or proceeding either in connection with any of its investments in this state or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

Acts 1958, No. 125.

THE INSURANCE CONTRACT LA. R.S. 22:611

§ 611. Scope of Part

A. The applicable provisions of this Part shall apply to insurance other than ocean marine and foreign trade insurances. This Part shall not apply to life insurance policies not issued for delivery in this state nor delivered in this state. This Part also shall not apply to any health and accident insurance policy not issued for delivery in this state nor delivered in this state, except for any group policy covering residents of Louisiana, regardless of from where it was issued or delivered. (Empasis added)

B. The exceptions in Subsection A of this Section do not apply to R.S. 22:627. The only exceptions from the requirements of R.S. 22:627 are those specifically stated therein.

Acts 1958, No. 125. Amended by Acts 1983, No. 188, § 1; Acts 1989, No. 563, § 1, eff. Sept. 1, 1989.

LA R.S. 22:1255 INSURANCE CODE

§ 1255. Requirements to be met before using courts

A Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (1) file with the clerk of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; or (2) procure a certificate of authority to transact the business of insurance in this state.

B. The court in any action, suit or proceeding in which service is made in the manner provided in Sub-sections B or C of R.S. 22:1253 may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Sub-section A of this Section and to defend such action.

C. Nothing in Sub-section A of this Section is to be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Sub-sections B or C of R.S. 22:1253 on the ground either (1) that no policy or contract of insurance has been issued or delivered to a citizen or resident of this state or to a corporation authorized to do business therein, or (2) that such insurer has not been transacting business in this state, or (3) that the person on whom service was made pursuant to Subsection C of R.S. 22:1253 was not doing any of the acts therein enumerated.

Acts 1958, No. 125.

Bond 2

Insurers subject to unauthorized insurer provisions I

Notes of Decisions

1. Insurers subject to unauthorized insurer provisions

Before court could apply unauthorized insurer provisions to defendant, which claimed to be a surplus line insurer not subject to the unauthorized insurer requirements, a trial on the merits of the case had to be held to determine defendant's status. Albers v. Schwab, App. 1969, 221 So.2d 301.

2. Bond

That foreign insurer did not comply with this section by filing bond to secure payment of any final judgment or procuring certificate to transact business in state did not preclude such insurer's appeal from denial of its declinatory exceptions. Vehrs v. Jefferson Ins. Co., App. 1964, 166 So.2d 20, application denied 247 La. 256, 170 So.2d 511.

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 98-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

POLARIS INSURANCE COMPANY, LTD.,

Petitioner,

vs.

CHARLES J. BRUNET, MAGNOLIA HOLDINGS, INC.,
MAINTENANCE DREDGING, INC.
and MAGNOLIA QUARTERBOATS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CARL J. HERBERT
EVANS & COMPANY
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150019

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STATEMENT PURSUANT TO RULE 29.6

None of the corporate Respondents have any parent companies and/or nonwholly owned subsidiaries.

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THE PARTIES AND STATEMENT OF THE CASE

On May 12, 1995, Respondent, Charles J. Brunet (hereinafter, "Brunet") filed suit against Magnolia Quarterboats, Inc., and Maintenance Dredging, Inc., for injuries arising out of an accident which occurred on October 21, 1994. On October 2, 1995, Brunet filed a First Supplemental and Amended Petition adding Magnolia Holdings, Inc. and its insurer, Polaris Insurance Company, Ltd. (hereinafter, "Polaris") as defendants to this litigation. In its Answer to both the original and First Supplemental Petitions filed on January 22, 1996, Polaris denied that it provided insurance coverage to Magnolia Holdings, Inc., Maintenance Dredging, Inc. and Magnolia Quarterboats, Inc. (all entities hereinafter referred to as, "M/H"). The insureds, M/H, filed third-party demands against their insurer, Polaris, for coverage, defense and indemnity. Thus, both Respondents, Brunet and M/H, seek recovery against Polaris and the positions of Respondents are aligned for purposes of this Brief in Opposition.

On November 15, 1996, Petitioner, Polaris, filed a motion for, and was granted, a Devolutive Appeal. In that motion, Polaris appealed from, "all prior Orders of the Court." Prior to November 15, 1996, the trial court signed the following Orders and/or Judgments:

* *Judgment on Motion to Compel Discovery dated August 5, 1996;*

* *Judgment and Reasons dated October 9, 1996 [Motion to Compel and for Sanctions filed by Charles Brunet; Motion to Strike the Amended Answer of Polaris filed by Magnolia, Motion to Compel and for Sanctions filed by Magnolia, Motion to Amend Third Party Petition filed by*

Magnolia, and Joint Motion to Strike the Pleadings Filed by Polaris filed by both Charles Brunet and Magnolia];

* *Order dated October 21, 1996 [Joint Motion for a Representative of Polaris Insurance Company, Ltd. to Appear at Hearing];*

* *Judgment dated October 28, 1996 at 8:25 a.m. [Joint Motion to Strike Pleadings Filed by Polaris Insurance Company, Ltd., for Failure to Comply with LA-Rev. Stat. Sect. 22:1255 or to Require Posting of Bond Pursuant to La-Rev. Stat. Sect. 22:1255* ***and*** *Joint Return for Sanctions for Failure to Respond Properly to Requests for Production of Documents in Compliance with the Court's Order];*

* *Order dated October 29, 1996 [Motion for Preliminary Default];*

* *Judgment and Reasons dated October 29, 1996 [Joint Motion to Strike the Pleading Filed by Polaris Insurance Company, Ltd. for Failure to Comply with LA-R.S. 22:12551];*

* *Judgment dated November 4, 1996 [Joint Oral Motion for Sanctions for the Failure of Polaris Insurance Company, Ltd. to Comply with the Court Order of October 28, 1996].*

In its original Brief to the Fifth Circuit Court of Appeals filed on April 23, 1997, Polaris provided the following Assignments of Error:

A. The trial court committed error in ruling that:

The Insurance Code of the State of Louisiana requires a non admitted insurer to post security by the authority of LA-R.S. 22:1245 and 1255.

B. The court erred in that:

The adverse presumptions are not supported by the law and are in violation of the equal protection clause and due process clause of the constitution of the United States.

C. The District Court erred in that:

The Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a memorandum and exhibits thereto that were ineffective in that the memorandum was improperly served and the exhibits were not served.

D. The Court erred in issuing:

The Order of October 25, 1996 that Polaris post a security bond in court by 8:30 a.m. on October 28, 1996 which was impossible to comply with.

E. The Court erred in issuing:

The Order of Sanctions for Failure to Appear Pursuant to Joint Debtor Rule is void for lack of jurisdiction.

F. The Court erred in re:

Jurisdiction of the District Court to issue an Order for examination of debtor may be issued only if based on a valid judgment.

G. The Court committed error:

In it's denial of Polaris' Motion to Amend Answer to allege that the MAG II was not a vessel in navigation at the time plaintiff was injured.

It should be noted that although Polaris included Assignment Error "E" in its Brief, the Judgment on the Joint Judgment Debtor Rule filed by Brunet and M/H was signed by the trial court on January 6, 1997, well after the filing of Polaris' Motion for Devolutive Appeal on November 15, 1996. Therefore, Assignment of Error "E" was improperly argued before the Court of Appeals.

On June 13, 1997, Polaris then filed a Writ with the Louisiana Supreme Court. In that Writ, Polaris made following Assignments of Error:

1. *The Fifth Circuit Court of Appeals should not have dismissed Polaris appear regarding the contempt citation and fine for failure to appear for Joint Debtor Rule.*

2. *On October 29, 1996, there was no pending direct contempt upon which fines of could issue without a show cause order. The only contempt was an indirect contempt committed outside the presence of the Court.*

3. *On October 29, 1996, there was no noticed motion pending to issue contempt citation. On October 29, 1996, there was no noticed motion pending to order production of any documents.*

4. *No evidence was presented to the court regarding the alleged constructive contempt.*

5. *The order submitted to the District Court by plaintiff Brunet's attorney was not in consonance with the order from the bench. It contained an order extending to a "any contempt."*

6. *On November 15, 1996 there was no valid judgment on which plaintiff could issue the Joint Debtor Rule or take an Order thereon.*

7. *On November 15, 1996, there was no basis for entry of Judgment by District Court of the 24th Judicial District, Parish of Jefferson, regarding the alleged contempt cited by plaintiff for failure of Polaris to appear therein.*

By Order dated October 3, 1997, the Louisiana Supreme Court granted Writs and the case was remanded to the Fifth Circuit Court of Appeals for consideration on the merits pursuant to its supervisory jurisdiction.

On November 19, 1997, Polaris filed their Brief with the Fifth Circuit Court of Appeals and listed the following Assignments of Error:

A. *Defendant assigns error in that the Court erred in issuing the Order of sanctions for failure to*

appear pursuant to Joint Judgment Debtor Rule is void for lack of jurisdiction.

B. *Defendant assigns error in that the Court erred in that the trial court committed error in ruling that the insurance code of the State of Louisiana requires a non-admitted insurer that issues a policy of marine insurance to post security by authority of LA-R.S. 22:1245 and 1255.*

C. *Defendant assigns error in that the adverse presumptions are not supported by the law and are in violation of the Constitution of the United States.*

D. *Defendant assigns error in that the Court erred in the Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a Memorandum and Exhibits thereto that were ineffective in that the Memorandum was improperly served and the exhibits were not served.*

On March 11, 1998, the Fifth Circuit Court of Appeals reversed in part and affirmed in part the ruling of the trial court. Polaris applied for Writs to the Supreme Court of the State of Louisiana. Polaris' Writs were denied by the Louisiana Supreme Court on May 29, 1998. Subsequent thereto and on August 1998, Polaris filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

Respondents, Brunet and M/H, oppose the Petition for Writ of Certiorari of Petitioner, Polaris, based upon the following:

I.

JURISDICTION

Briefs submitted by Polaris to date have failed to state an appropriate statutory provision conferring jurisdiction upon this Court allowing Polaris to seek a Writ of Certiorari. Polaris' initial Brief cited 28 U.S.C. § 1252 as the basis for jurisdiction, which statute has been repealed and is inapplicable to the instant case. Polaris' current Writ cites 28 U.S.C. § 1254(1) as the basis for jurisdiction which also appears inapplicable in that this matter does not involve an appeal from a United States Court of Appeals and no lower federal court has heretofore exercised jurisdiction in this matter. While it is unclear, Polaris, without stating name, may be seeking Certiorari on the basis of 28 U.S.C. § 1257, which allows a litigant to seek certiorari in instances where a final Judgment has been rendered by the highest court of a state. However, the record will reveal that no final Judgment has been rendered in this matter at any time by the trial court, as all state court appellate relief sought by Polaris has involved interlocutory matters, raised prior to any trial on the merits.

II.

MATTERS OF DISCRETION

Recognizing that a review by this Honorable Court on a Writ of Certiorari is not a matter of right but of judicial discretion, Rules of Supreme Court, Rule 10, the character of the reasons for the Court to consider such a Writ as set forth in Rule 10 strongly suggest that Polaris' Writ should not be granted. This matter not arising from a lower court decision of a United States Court of Appeals, Supreme Court Rule 10(a)'s provisions are inapplicable. Further, the provisions of Supreme Court Rule 10(b), which suggest that granting of a Writ of

Certiorari would be appropriate in instances where a state court of last resort has decided an important federal question in a manner that conflicts with a decision of another state court of last resort or a United States Court of Appeals, is not raised in Polaris' Writ and is, therefore, not applicable herein. Finally, Supreme Court Rule 10(c), which would consider the granting of a Writ in instances where a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question which conflicts with a decision of this Court, simply does not apply to this case.

Polaris merely seeks to obtain a Writ from this Court by complaining of alleged erroneous factual findings relative to interlocutory matters, or the misapplication of applicable state law. The charter of the matters sought to be reviewed do not approach or reach a level of federal importance to mandate review by this Court.

Supreme Court Rule 10 plainly states, "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

III.

NO FEDERAL QUESTION RAISED BELOW

Polaris' Brief has failed to state when, or where, any federal questions sought to be raised in any lower court, with the exception of one obscure reference to due process as respects to interlocutory orders relating to discovery and evidentiary rulings against Polaris for failure to comply with Court Orders resulting in sanctions resulting the Court granting adverse resumptions against Polaris. These matters involve a factual

determination made by the court resulting in appropriate sanctions and does not involve any Constitutional issues. Thus, there has been no showing by Polaris that any federal question has timely and properly raised at any stage, and that this Court as jurisdiction to review any Judgment on a Writ of Certiorari. Supreme Court Rule 14(g)(i) clearly requires that Polaris set forth these matters and Polaris' Writ fails to comply with these provisions.

IV.

LACK OF ACCURACY, BREVITY AND CLARITY

It is difficult for Respondents, Brunet and M/H, to fully understand and appreciate what issues are raised herein, based upon the failure of Polaris to succinctly set forth same in its Writ. This, alone, constitutes sufficient grounds for this Court not to grant Certiorari. Supreme Court Rule 14(4) provides that failure ". . . to present with accuracy, brevity and clarity whatever is essential in order to allow ready and adequate understanding of the points . . ." for which consideration is sought is sufficient basis to deny a petition. Based upon the lack of clarity of the submission of Polaris in and of itself, this Court may deny Polaris' Writ on this basis alone.

V.

OBJECTION TO POLARIS' STATEMENT OF THE CASE

In setting forth its Statement of the Case, Polaris' Petition at pages 2 through 6, inclusive, sets forth numerous actual disputes. Brunet and M/H specifically object to the facts as set forth by Polaris and adopt herein their position relative to the applicable Statement of the Case as fully set forth herein.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Honorable Court decline to review Polaris' Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

No.98 732

Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

POLARIS INSURANCE COMPANY, LTD, a foreign corporation

Petitioner

vs.

CHARLES J. BRUNET, PLAINTIFF

Respondent

MAGNOLIA HOLDINGS, INC.

Respondent

On Petition for Writ of Certorari to the Supreme Court and the Fifth Circuit Court of Appeal of the State of Louisiana

REPLY TO RESPONSE TO PETTION

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I STATEMENT OF THE CASE

Respondents Brunet's and Magnolia's statement of the case, although factual, does not reach the issues developed in the petition. Polaris' statement of the case is more meaningful to this court and is the version that this court should consider.

II JURISDICTION

This court may review Polaris application for Writ of Certiorari on the basis of 28 U.S.C. § 1257, which allows a litigant to seek certiorari in instances where a final Judgment has been rendered by the highest court of a state. The judgments herein have been reviewed by the highest court in the State of Louisiana as final judgments. La. CCC Art 2166(A). Louisiana does not provide for appeal in the traditional sense but provides instead for Writ of Certiorari. The due process issue of jurisdiction may be raised at any stage of the proceedings and was raised at all stages below.

Respondent's position is that there is no final judgment. Polaris pleadings have been stricken from the record. There will be no trial on the merits. This court may review Polaris petition under the death knell doctrine. Nothing more can be done by Polaris.

III FEDERAL ISSUES

Denial of Due Process is a Federal Issue which is subject to application for a Writ of Certioari. Polaris has cited the failure of due process in response to Rule 10 requiring that the applicant state the **CONSTITUTIONAL AND STATUTORY PROVISI0NS INVOLVED**, Polaris Petition for Writ of Certioari, Pg. 2:

"Due Process and Equal Protection of the Law in that the Courts of the State of Louisiana, under La. Civ. Code Ann. Art. 9, is a clear language state, the Louisiana courts have rewritten the law and have taken upon themselves the power to establish public policy which is reserved to the legislature. La. R.S. Sect. 22:611 exempts Polaris from the requirements of contract as prescribed by the State of Louisiana, La. R.S. 22:1249 and La. R.S. 22:1269 exempt Polaris from the requirements of Posting Bond and from the Prohibitions of La. R.S. 1254 and 1255 regarding use of the Louisiana Courts. C.C. Arts. 1, 2 and 3 prohibit the courts from establishing public policy and reserve that power to the legislature. La. Code of Civ. Pro. art. 1155 required service of supplementary matter, Local Rules of Court for the Twenty-Fourth District of Louisiana, Parish of Jefferson CIVIL RULE XVI NOTICE Local rules CIV RULE XVII EXHIBITS required service at least 72 hours prior to hearing of the exhibits used in court upon which the judgment was based. There was no service, and no jurisdiction, thus the court orders are invalid."

IV FORM vs. SUBSTANCE

Respondents argue form over substance and matters of draftsmanship rather than real issues. Orders or judgments issued without jurisdiction, failure of notice requirements, violation of separation of powers and missapplication of statutes are all failure of due process and violation of equal protection of law. Polaris satisfaction of this court's requirement for citation of Constiutional provisions and statutes

involved clearly satisfies Polaris' duty to raise Constitutional or federal question in this court. That the errors raised in he courts below are, in substance,due process violations satisfies the federal question requirement.

Respondent has not addressed the real issues herein because They cannot successfully do so and thus resort to procedural agrument only.

The record provided in Polaris Appendix is complete. It establishes without doubt that the courts below denied Polaris due process at nearly all levels. Proof thereof is the result of the supervisory order of the Louisiana Supreme Court and the result thereof in the Fifth Circuit Court of Appeal of the State of Louisiana.which reversed nearly all of the District Court's rulings. The Fifth Circit Court of Appeals could not have ruled in favor of Respondent without usurping the powers of the legislature and the plain language interpretation of law required by the Constitution and statutes of the State of Louisiana.

V THE ERRORS CITED BY POLARIS CONSTITUTE DENIAL OF DUE PROCESS AND ARE JURSDICTIONAL IN NATURE

Taking of an important right without due process is prohibited by the 14th Amendment to the U.S. Constitution.

The right ultimately denied was a trial on the issues rather than a default by the court.

(a) **Jurisdiction:** The court must have jurisdiction over the parties and the subject matter of the action; i.e., the case must be one which the court is empowered to consider, and the parties must be given notice of the proceeding. Scott v. Neal, 154 U.S. 34, 14 S.Ct. 1108, 1112, 38 L.Ed. 896, 901 (1894).

(b) **Notice and Opportunity for Hearing**: The parties must have reasonable notice and an opportunity for hearing. Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 20, 53 L.Ed. 97, 111 (1908); Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 560, 90 L.Ed. 635, 640; (1946). 16A Am.Jur.2d, Constitutional Law §827 et seq.

(c) **Fairness of Hearing**: The right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses. 16A Am.Jur. 2d, Constitutional Law §841 et seq.

In its original brief to the Fifth Circuit Court of Appeal filed on april 23, 1997 Poaris provided the following assignments in error:

A. The trial court committed error in ruling that:
The Insurance Code of the State of Louisiana requires a non admitted insurer to post security by the authority of LA -R. S. 22:1245 and 1255. ***[Denial of rights established by law is denial of due process.]***

B. The court erred in that:
The adverse presumptions are not supported by the law and are in violation of the equal protection clause and due process clause of the constitution of the United States. *[Denial of due process is stated directly herein as not supported by law.]*

C. The District Court erred in that:
The Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a memorandum and exhibits thereto that were ineffective in that the memorandum was improperly served and the exhibits were not served. ***[Failure to serve moving papers giving notice is denial of due process.]***

D. The Court erred in issuing:
The Order of October 25, 1996 that Polaris post a security bond in court by 8:3 0 a.m. on October 28, 1996 which was impossible to comply with. ***[Unfairness of judicial proceedings is a denial of due process.]***

E. The Court erred in issuing:
The Order of Sanctions for Failure to Appear Pursuant to Joint Debtor Rule is void for lack of jurisdiction. ***[Judicial action beyond the jurisdiction of the court is denial of due process.]***

F. The Court erred in re:
Jurisdiction of the District Court to issue an Order for examination of debtor may be issued only if based on a valid judgment. Court has no jurisdiction based on invalid judgment. ***[Process or orders based on invalid judgment is denial of due process.]***

G. The Court committed error:
In it's denial of Polaris' Motion to Amend Answer to allege that the MAG II was not a vessel in navigation at the time plaintiff was injured. ***[This issue was not argued in Polaris petition.]***

On June 13, 1997, Polaris then filed a Writ with the Louisiana Supreme Court. In that Writ, Polaris made following Assignments of Error:

1. The Fifth Circuit Court of Appeals should not have dismissed Polaris appear (sic appeal) regarding the contempt citation and fine for failure to appear for Joint Debtor Rule. ***[This merged into Polaris' reapplication to the Fifth Circuit Court of Appeal]***

2. On October 29, 1996, there was no pending direct contempt upon which fines of could issue without a show cause order. The only contempt was an indirect contempt committed

outside the presence of the Court. ***[The court lacked jurisdiction because the contempt was indirect,thus its action was denial of due process.]***

3. On October 29, 1996, there was no noticed motion pending to issue contempt citation. On October 29, 1996, there was no noticed motion pending to order production of any documents. ***[Failure of notice provision was failure of due process.]***

4. No evidence was presented to the court regarding the alleged constructive contempt. ***[Judgment or order issued unsuported by evidence is failure of due process.]***

5. The order submitted to the District Court by plaintiff Brunet's attorney was not in consonance with the order from the bench. It contained an order extending to a "any contempt. " ***[Issuing order not conforming to court record, is denial of due process.]***

6. On November 15, 1996 there was no valid judgment on which plaintiff could issue the Joint Debtor Rule or take an Order thereon. ***[Issuing order based on invalid judgment is denial of due process.]***

7. On November 15, 1996, there was no basis for entry of Judgment by District Court of the 24th Judicial District, Parish of Jefferson, regarding the alleged contempt cited by plaintiff for failure of Polaris to appear therein. ***[Issuing order without legal basis is denial of due process.]***

By Order dated October 3, 1997, the Louisiana Supreme Court granted Writs and the case was remanded to the Fifth Circuit Court of Appeals for consideration on the merits pursuant to its supervisory jurisdiction.

On November 19, 1997, Polaris filed their Brief with the Fifth Circuit Court of Appeals and listed the following Assignments of Error:

A. Defendant assigns error in that the Court erred in issuing the Order of sanctions for failure to appear pursuant to Joint Judgment Debtor Rule is void for lack of jurisdiction. ***[Orders issued based on invalid judgment are denial of due process.]***

B. Defendant assigns error in that the Court erred in that the trial court committed error in ruling that the insurance code of the State of Louisiana requires a non-admitted insurer that issues a policy of marine insurance to post security by authority of LA -R. S. 22:1245 and 1255. ***[State Court's disregard of state law is denial of due process.]***

C. Defendant assigns error in that the adverse presumptions are not supported by the law and are in violation of the Constitution of the United States. ***[Orders issued without legal basis are denial of due process.]***

D. Defendant assigns error in that the Court erred in the Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a Memorandum and Exhibits thereto that were ineffective in that the Memorandum was improperly served and the exhibits were not served. ***[Lack of timely service of moving papers is denial of due process.]***

On March 11, 1998, the Fifth Circuit Court of Appeals reversed in part and affirmed in part the ruling of the trial court. Polaris applied for Writs to the Supreme Court of the State of Louisiana. Polaris' Writs were denied by the Louisiana Supreme Court on May 29, 1998. Subsequent thereto and on August 27,

1998, Polaris filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

VI POLARIS HAS RAISED FEDERAL QUESTIONS BELOW IN THE FORM OF DEINALS OF DUE PROCESS

Thus, Polaris' Brief does state federal questions were sought to be raised in any lower court, including the matter of due process as respects to orders relating to discovery and evidentiary rulings against Polaris for failure to comply with Court Orders resulting in sanctions resulting the Court granting adverse presumptions against Polaris.

Respondents claim that the matters raised byPolaris do not involve any Constitutional issues is incorrect. There are federal questions timely and properly raised at all stages of the proceedings below and this Court has jurisdiction to review this Judgment on a Writ of Certiorari. Polaris complies with Supreme Court Rule 14(g)(i) setting forth these matters with reference to the orders below. Polaris also complied with Supreme Court Rule 14(4).

VII PENDANT JURISDICTION

Respondents admit that the petitioner has clearly stated at least one ground that directly states due process of law as the federal question. This court may review all other matters under its pendant jurisdiction. That particular issue was raised only by the Fifth Circuit Court of Appeal in citing in its opinion State of Louisiana In the Interest of J.B., No. 86-C-319.

VIII MATTERS OF DISCRETION

Supreme Court Rule 10 does permit this court to grant certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The errors herein are a matter of law. Polaris has stated its request for relief in the nature of error in the courts below as is typical of most briefs, however the substance of those assignments are essentially denials of due process going to the jurisdiction over the subject matter, the person, lack of notice, fair hearing, ursupation of legislative powers and utter disregard of black letter law. Said errors are so gross that they shock the conscience and should be reviewed by this highest court. This court is the only protection which a litigant has from the parochialism of some jurisdictions.

Insurance and litigation are part of the business of doing business. Without state recognition of that important relationship the business of doing business is threatened. Pg. 6, application for writ.

> "1. Marine Marketing does apply because the statutory exception is in the jurisdictional section of Part XXVII. It was clearly intended to limit the executive, judicial power and the power of the others who are the subject or the object of the several sections. The finding that 22:1255 only concerns access to the courts is absurd. Litigation is part of doing business as much as is selling or other facets of the modern enterprise. Find one successful enterprise without a stable of lawyers, both corporate and litigation. Two necessities common to all of today's business are insurance and lawyers."

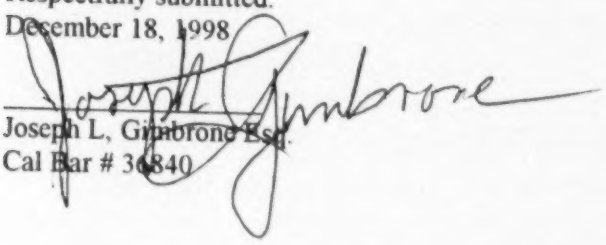
IX RESPONDENTS' BRIEF IS UNSIGNED, NO CERTIFICATE OF SERVICE WAS SERVED UPON PETITIONER

Respodents have either failed to sign their Brief In Opposition or have failed to serve Petitioner a signed copy thereof. Nor have respondents served Petitioner a copy of their proof of service in accordance with Rule 10. Polaris objects thereto.

X CONCLUSION

Based on the foregoing it is respectfully submitted that this Honorable Court accept review of this Writ of Certioari and order a full briefing thereon.

Respectfully submitted.
December 18, 1998



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